CERTIFICATE OF DIVISION.

SUPREME COURT OF THE UNITED STATES.

No. 51.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

PETER ROSE, COLLECTOR, &c.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED FEBRUARY 23, 1875.

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1 October term, A. D. 1874.

At a stated term of the circuit court of the United States, within and for the northern district of Ohio, begun and held at Cleveland, in said district, on the first Tuesday of October, being the sixth day of that month, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States of America the ninety-ninth.

Present, the honorable Halmor H. Emmons, circuit judge, and the honorable Martin Welker, district judge.

Among the proceedings then and there had were the following, to wit:

THE LAKE SHORE & MICHIGAN SOUTHERN Railway Company *vs.* PETER ROSE. } 2231. Certiorari.

Be it remembered that heretofore, to wit, on the 10th day of March, A. D. 1871, came the defendant, Peter Rose, by his attorney, George Willey, and filed in the clerk's office of said court his petition for the removal of a certain cause then pending in the court of common pleas within and for the county of Cuyahoga and State of Ohio, into
2 the circuit court aforesaid, under and pursuant to the act of Congress in such case made and provided, which said petition is in the words and figures following, to wit:

Petition.

To the honorable the circuit court of the United States, held in and for the northern district of Ohio:

The petition of said Peter Rose, of said northern district of Ohio, in the county of Cuyahoga, Ohio, within said district, respectfully represents that your petitioner was at the various times hereinafter named, and is now, an officer of the United States, to wit, collector of internal revenue in and for the eighteenth district of Ohio aforesaid.

That your petitioner was, on the 2nd day of March, A. D. 1871, personally served with a summons and complaint, issued out of the court of common pleas of the said county of Cuyahoga and State of Ohio, wherein The Lake Shore & Michigan Southern Railway Company is named as plaintiff, and your as defendant.

That said summons and complaint were served on petitioner within said eighteenth district of Ohio and said northern district; that by such service, a suit and prosecution has been commenced in said
3 court of common pleas of said Cuyahoga County, Ohio, against your petitioner, and that the grounds of such suit and prosecution, as stated in the complaint aforesaid, are, that your petitioner did on or about the 25th day of February, A. D. 1871, acting as collector of internal revenue of the United States for the said eighteenth district of Ohio, and in obedience to the express command of the Commissioner of Internal Revenue of the United States, by distraint and seizure of two locomotives, of the value of $12,000, compel the said railway company to pay the sum of nine thousand two hundred seventy-nine $\frac{50}{100}$ dollars, which had previously thereto been assessed against said company as a tax on the amount of $185,590 of interest paid by said company on its bonds on the first day of July, A. D. 1870; also a further sum of $463\frac{97}{100}$

as a penalty for the non-payment of said tax, and the further sum of $563\frac{79}{100}$ interest on said tax & penalty and costs of said distraint, which tax, penalty, interest, and costs *is* alleged in said complaint to have been illegal and void. Your petitioner therefore prays that the said action may be removed into the circuit court of the United States
4 in and for the northern district of Ohio, pursuant to the provisions of the statute in such case made and provided.

And your petitioner will ever pray, &c.

PETER ROSE.

MARCH 10, 1871.

THE NORTHERN DISTRICT OF OHIO,
Cuyahoga County, ss:

Peter Rose, of said county and district, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes the same to be true.

PETER ROSE.

Sworn before me this 10th day of March, A. D. 1871.

EARL BILL, *Clerk.*

THE NORTHERN DISTRICT OF OHIO:

I, George Willey, do hereby certify that I reside at the city of Cleveland, in the said district; that I am a counsellor at law in the court of common pleas of Cuyahoga County, and also in the circuit court of the United States for the northern district of Ohio; that as counsellor for the above-named petitioner I have examined the proceedings against him, and have carefully inquired into all the matters set forth in
5 the foregoing petition, and that I believe the same to be true.

GEO. WILLEY,
U. S. Attorney.

MARCH 10, 1871.

And afterwards, to wit, at the January term of said court, to wit, on the 10th day of March A. D. 1871, came Peter Rose, collector of internal revenue for the 18th district of Ohio, and presented his petition for the removal of a certain cause pending in the court of common pleas within and for the county of Cuyahoga and State of Ohio, wherein The Lake Shore and Michigan Southern Railway Company is plaintiff, and the said Peter Rose, collector as aforesaid, is defendant, into this court, under and in pursuance of the act of Congress in that behalf made and provided, which petition is duly verified according to the act aforesaid.

Whereupon it is ordered that a writ of certiorari be issued to the judges of said court of common pleas as in said petition prayed.

And thereupon there was duly issued by the clerk of said circuit court a certain writ of certiorari, which is in the words and figures following, to wit:

Writ of certiorari.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

To the honorable the judges of the court of common pleas within and for the county of Cuyahoga and State of Ohio, greeting:

6 Whereas Peter Rose, collector of internal revenue for the eighteenth district of Ohio, has this day presented to our circuit

court of the United States within and for the said northern district of Ohio his petition for the removal of a certain cause now pending before you, as is said, wherein the Lake Shore & Michigan Southern Railway Company is plaintiff, and the said Peter Rose, collector as aforesaid, is defendant, into our said circuit court of the United States, under and pursuant to act of Congress of the United in such case made and provided.

Therefore, you are hereby required to send to our said circuit court of the United States for the district aforesaid, duly certified, the record and proceedings in your said court of common pleas in the cause aforesaid, to the end that the said cause may be proceeded with in our said circuit court, and that what is right and just in the premises may be done between the parties aforesaid.

Witness the honorable Salmon P. Chase, Chief-Justice of the United States, this 10th day of March, in the year of our Lord one thou-
7 sand eight hundred and seventy-one, and of the Independence of the United States of America the ninety-fifth.

[SEAL.] EARL BILL,
Clerk of the Circuit Court of the United States for the Northern District of Ohio.

And afterward, to wit, on the 16th day of March, A. D. 1871, said writ of certiorari was duly returned to said clerk's office by said marshal, with his proceedings thereon endorsed, in the words and figures following, to wit:

Return.

NORTHERN DISTRICT OF OHIO, *ss:*

On the 11th day of March, A. D. 1871, I served this writ by delivering a duplicate thereof to Frederick S. Smith, clerk of the within-named court of common pleas for Cuyahoga County and State of Ohio, at Cleveland, Ohio.

R. HASTINGS,
U. S. Marshal,
By E. A. ABBOTT, *Deputy.*

And afterward, to wit, on the 29th day of June, A. D. 1871, was returned to said clerk's office a duplicate of said writ, endorsed as follows, to wit:

Return of duplicate writ.

STATE OF OHIO,
Cuyahoga Co., ss:

The execution of the within writ is evidenced by a certified copy
8 of the record and proceedings of the said court of common pleas within and for the county of Cuyahoga and State of Ohio, hereunto annexed.

FRED'K S. SMITH,
Clerk Court Com. Pleas Cuyahoga Co., O.

Said certified copy of record is in the words and figures following, to wit:

Transcript.

In the court of common pleas. Ex. doc. 37-282.

THE STATE OF OHIO,
Cuyahoga County, ss:
THE LAKE SHORE & MICHIGAN SOUTHERN Railway Company
vs.
PETER ROSE.

Be it remembered that heretofore, to wit, at a term of the court of common pleas begun and held at the court-house in the city of Cleveland, within and for the county of Cuyahoga and State of Ohio, on the 13th day of February, in the year of our Lord one thousand eight hundred and seventy-one, by and before their honors Horace Foote, Samuel B. Prentiss, and Robert F. Paine, judges of the court of common pleas of the fourth judicial district of the State of Ohio, there was duly filed in said court (on the 27th day of February, A. D. 1871, being a day in said term) a certain petition in this cause, in the words and figures following, to wit:

9 *Petition.*

Court of common pleas, Feb. term, A. D. 1871.

THE STATE OF OHIO,
Cuyahoga County:
THE LAKE SHORE & MICHIGAN SOUTHERN Railway Company, plaintiff,
vs.
PETER ROSE, DEFENDANT.

The Lake Shore & Michigan Southern Railway Company, plaintiff, complaining of the said Peter Rose, defendant, says that on, to wit, the 1st day of July, A. D. 1870, the said plaintiff, being a railroad corporation ow'ing a railroad extending from the city of Buffalo, New York, to the city of Chicago, in the State of Illinois, with divers branches, and having its principal office in the city of Cleveland, Ohio, was indebted in divers sums of money, evidenced by bonds, which had theretofore been issued by the original companies of which it was formed by consolidation, and for the payment of which, with the interest-coupons thereto attached, it was then and there liable and bound to pay the same as though issued by itself; that interest-coupons representing the interest accrued on said bonds, from January 1st to July 1st, A. D. 1870, had become due
10 to the amount of $185,590 on the said 1st day of July, A. D. 1870; that the said plaintiff paid the said interest as the said coupons were presented to it, on said 1st day of July, and within a few days, to wit, ten days thereafter, in full, without deducting or withholding, and without any authority in law to withhold, therefrom five per cent. or any per cent. for taxes.

Plaintiff further says that after the 14th day of July, 1870, the assessor or proper internal-revenue officer of the United States for the 19th district of Ohio, under pretence of authority under the laws of the United States, assessed against said plaintiff the sum of $9,279.50 as a tax of five per cent. on the whole amount of said sum of $185,590, claimed to

be due from it to the United States. Plaintiff further says that after said pretended tax had been assessed against it, it very soon thereafter and repeatedly protested against it, and in several interviews had with the said collector claimed and insisted to him that no law existed subjecting the plaintiff to said tax, and that the said assessment was void, and asking that the same should be abated, and through said col-
11 lector appealed to the Commissioner of Internal Revenue, by requesting and procuring the said collector to communicate to him by letter the objections and protests of the plaintiff to said tax, and the reasons by it assigned, and its claims as aforesaid in reference thereto, but the said Commissioner, by letters, replied deciding against said appeal, protest, objections, and claims, and refused to remit or abate said pretended tax, but expressly ordered the defendant, who was the collector of said district, to enforce the collection of the same by distraint if necessary. That plaintiff made a further appeal directly to the Commissioner of Internal Revenue after said assessment, and before the collection of the same, as hereinafter stated, and presented its objections and protest against said tax and the claim of the plaintiff, that the same was without authority of law and void, and asked an abatement and instructions to have the same set aside and abated, but that the said Commissioner answered said appeal in writing and overruled it, and refused to prevent the collection of said pretended tax, and plaintiff was by the Com-
12 missioner advised that the said department had finally determined to enforce the collection of the said assessment so made against plaintiff, and that after much discussion of the many similar cases which had arisen, the said Commissioner had finally decided that the act of Congress approved July 14th, 1870, entitled "An act to reduce internal taxes and for other purposes," under which the said assessment was claimed to have been made, contained a legal and operative provision requiring the assessment of said tax and its collection, and that the same would be enforced against plaintiff.

Plaintiff further says, that afterwards, on the 25th day of February, A. D. 1871, the said defendant being and acting as collector of internal revenue of the United States for the district of Ohio, and in obedience to the express command and final decision of the Commissioner of Internal Revenue of the United States, as aforesaid, required, and by distraint and seizure of personal property of plaintiff, to wit, of two locomotives, of the value of $12,000, compelled the plaintiff to pay a tax of five per centum on said sum of $185,590 to the United States,
13 which tax amounted to the sum of $9,279.50, and at the same time, and by the same coercive means, compelled the plaintiff to pay as a penalty on said tax the additional sum of $463.97; also interest on said tax from August 1st, 1870; also the costs of said distraint, which amount to $563.79; amounting, for said tax, penalty, and interest, to the sum of $10,221.85, and, including said costs, to the sum of $10,585.64, which sum of money was so paid by said plaintiff to said Rose on the 25th day of February, A. D. 1871, under protest and express notice to said Rose, given him by plaintiff, that it would resort to its action at law to recover back the same. Plaintiff says that it did not then, or at any time, owe the United States said tax, or any part thereof; that the same was previously thereto assessed against it, and was demanded and collected from it without authority of law, and by an unlawful violation of its rights, but under the command of the Commissioner and other proper officers of the internal revenue, and that there is now due to it from defendant, by reason of the premises, the sum of $10,585.64 and interest, as aforesaid. Plaintiff prays

14 judgment for the said sum of $10,585.64, and for interest on the same from the said 25th day of February, A. D. 1871.

JAMES MASON &
ESTEP & BURKE,
Att'ys for Pl'ff.

THE STATE OF OHIO,
Cuyahoga County, ss:

James Mason, on his oath, says that he is the attorney of the above-named plaintiff, which is a corporation; and that all the matters in the foregoing petition contained are true, as he verily believes.

JAMES MASON.

Sworn to and subscribed by said Mason before me and in my presence this 25th day of February, A. D. 1871.

[SEAL.] GEORGE W. MASON,
Notary Public.

Precipe.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, PLAINTIFF,
vs.
PETER ROSE, DEFENDANT.

To clerk:

Issue summons against defendant, returnable according to law. Endorse suit brought to recover money paid, money had and re-
15 ceived, and money collected by illegal distraint; sum claimed, $10,585.64, and interest from Feb'y 25th, 1871.

JAMES MASON,
Att'y for Pl'ff.

Said petition was endorsed as follows, to wit: "The Lake Shore & Michigan Southern Railway Company vs. Peter Rose. Petition for money only. Mason, Estep & Burke."

And thereupon was duly issued a certain summons in this cause, in the words and figures following, to wit:

Summons.

THE STATE OF OHIO,
Cuyahoga County, ss:

To the sheriff of Cuyahoga County:

You are commanded to notify Peter Rose that he has been sued by the Lake Shore and Michigan Southern Railway Company, in the court of common pleas of Cuyahoga County, and that unless he answer by the 1st day of April, A. D. 1871, the petition of the said plaintiff against him, filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on the 13th day of March, A. D. 1871.

Witness Frederick S. Smith, clerk of said court, and the seal thereof, at the city of Cleveland, this 27th day of February, A. D. 1871.

[SEAL.] FREDERICK S. SMITH, *Clerk,*
By H. CLAY WHITE, *Deputy Clerk.*

16 Said summons was endorsed as follows, to wit: "Cuyahoga common pleas. The Lake Shore & M. S. R'y Co. vs. Peter Rose. Summons in action for the recovery of money only. Amount claimed, $10,585.64, for which, with interest from the 25th day of February, A. D. 1871, judgment will be taken if you fail to answer. Returnable M'ch 13th, 1871. James Mason, plaintiff's attorney."

And thereupon, on the 3d day of March, A. D. 1871, being also a day in said term, came the *the* sheriff of said county, and duly returned said summons so directed to him, with his return thereon endorsed, as follows, to wit: "Return received February 27, 1871, 3 p. m. John N. Frazee, sheriff."

THE STATE OF OHIO,
Cuyahoga Co., ss:

On the 2nd day of March, A. D. 1871, I served this summons, by delivering to Peter Rose a true and certified copy thereof.

JOHN N. FRAZEE, *Sheriff*,
By GEORGE RIDGEWAY, *Deputy.*

Sheriff's fees, $1.50.

And thereupon, on the 10th day of March, A. D. 1871, being also a day in said term, was duly filed in said court a certain writ of certiorari from the circuit court of the United States for the northern district of Ohio, in this cause, in the words and figures following, to wit:

Writ of certiorari.

17 THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

To the honorable the judges of the court of common pleas within and for the county of Cuyahoga and State of Ohio, greeting:

Whereas Peter Rose, collector of internal revenue for the eighteenth district of Ohio, has this day presented to our said circuit court of the United States, within and for the said northern district of Ohio, his petition for the removal of a certain cause now pending before you, as is said, wherein The Michigan Southern Railway Company is plaintiff, and the said Peter Rose, collector as aforesaid, is defendant, into our said circuit court of the United States, under and pursuant to the act of Congress of the United States in such case made and provided: Therefore, you are hereby required to send to our said circuit court of the United States for the district aforesaid, duly certified, the record and proceedings in your said court of common pleas in the cause aforesaid, to the end that the said cause may be proceeded with in our said circuit court, and that what is right and just in the premises may be done between the parties aforesaid.

18 Witness the Honorable Salmon P. Chase, Chief-Justice of the United States, this 10th day of March, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States of America the ninety-fifth.

[SEAL.] EARL BILL,
Clerk of the Circuit Court of the United States for the Northern District of Ohio.

(Endorsed:) Circuit court of the United States, northern district of

Ohio. The Lake Shore & Michigan Southern Railway Company vs. Peter Rose, collector internal revenue 18th district Ohio. Writ of certiorari. (Duplicate.) Geo. Willey, U. S. att'y & counsel for petitioner. (46–654.)

And thereupon, at this term, it appearing to the court that a writ of certiorari has been issued to this court by the circuit court of the United States for the northern district of Ohio, requiring *to* this court to send to said circuit court the record and proceedings in this cause; and it appearing that this action is against said Peter Rose, collector of internal revenue of the United States for the 18th collection district of Ohio, on account of acts done as such collector, and under color
19 of his office as such collector, and affecting the internal-revenue laws: It is ordered that further proceedings in this court be stayed, and that the clerk of this court comply with said writ of certiorari, the proceedings in said circuit court and said writ, and the proceedings herein, being under the provisions of the 67th section of the act of Congress of the United States, approved July 13, 1866, in relation to internal revenue.

The plaintiff's costs in this cause are taxed at $9.55.

THE STATE OF OHIO,
Cuyahoga County, ss:

I, Frederick S. Smith, clerk of the court of common pleas within and for said county, and in whose custody the files, journals, execution-dockets, & records of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing copy is taken and copied from the record of the proceedings of the court of common pleas, within and for said Cuyahoga County, and that said foregoing copy has been compared by me with the original record, and that the same is a correct transcript thereof.

In testimony whereof I do hereto subscribe my name officially
20 and affix the seal of said court, at the court-house in the city of Cleveland, in said county, this 19th day of April, A. D. 1871.

[SEAL OF COURT.] FREDERICK S. SMITH,
Clerk.

And thereupon, afterwards, this cause was continued from term to term of said circuit court until the April term thereof, A. D. 1874.

And afterward, to wit, on the 23d day of June, A. D. 1874, the demurrer of the *the* said defendant was duly filed herein in said clerk's office of said circuit court, which is in the words and figures following, to wit:

Demurrer.

United States circuit court, northern district of Ohio.

THE LAKE SHORE & MICHIGAN SOUTHERN Railway Company *vs.* PETER ROSE. } Demurrer.

And now comes the defendant and demurs to the petition of the plaintiff, and for cause says:

First. That the petition does state facts sufficient to constitute a cause of action against this defendant.

21 Second. That said petition does not show that prior to the commencement of said action an appeal was duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury, established in pursuance thereof, as was required by the 19th section of the act of Congress, approved July 13th, 1866.

GEO. WILLEY,
U. S. Attorney N. D. O.

And thereupon this cause was continued until the October term, 1874, of this court, at which said term, to wit, on the 21st day of December, A. D. 1874—

Hearing on demurrer.

At this term, on the 21st day of December, 1874, this cause came on to be heard on the demurrer to the plaintiff's petition.

2d ground overruled; 1st ground sustained.

Whereupon the court overrule the second cause or ground of demurrer so numbered therein, but sustain the first cause or ground of demurrer, to wit, that the petition does not state facts sufficient to constitute a cause of action against said defendant.

Petition dismissed; difference of opinion.

And thereupon, the case being submitted, the court orders and adjudges that said petition be dismissed, and that the defendant recover of said plaintiff his costs herein to be taxed. But the said judges
22 certify it to have been on the trial of said cause, the fact that they differed, and that they differ in opinion as to whether the assessment of said tax of $9,279.50, referred to in said petition, was lawfully made.

23 NORTHERN DISTRICT OF OHIO, *ss:*

It is hereby certified that the foregoing is truly taken and copied from the record and proceedings of the circuit court of the United States within and for the district aforesaid.

Witness my official signature and the seal of said court, at Cleveland, in said district, this 20th day of January, A. D. 1875.

[SEAL.] EARL BILL,
Clerk of said Circuit Court.

(Indorsed:) No. . U. S. Supreme Court. Lake Shore & M. S. R'y Co. vs. Peter Rose. Error to cir. court U. S., nor. dist. Ohio. Transcript of record in circuit court. Clerk, bill on this trans., $7.85. Paid by J. Mason, esq. Earl Bill, cl'k.

24 Know all men by these presents that we, the Lake Shore & Michigan Southern Railway Company, as principal, and James Mason, as surety, are held and firmly bound unto Peter Rose in the penal sum of two hundred dollars, to the payment whereof, well and truly to be made, we do by these presents jointly and severally bind ourselves, our heirs, our legal representatives and assigns.

Sealed with our seals and dated this 18th day of January, A. D. 1875.

The condition of the above obligation is such that where as the said Lake Shore & Michigan Southern Railway Company has sued out of the Supreme Court of the United States a writ of error upon a certain judgment rendered in the circuit court of the United States within and for the northern district of Ohio, at the October term thereof, A. D. 1874, in favor of Peter Rose, for the sum of twenty-three dollars and twenty-five cents, costs of suit:

Now, therefore, if the said Lake Shore & Michigan Southern Railway Company shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, then the above obligation shall be void, otherwise, in full force in law.

JAMES MASON. [SEAL.]

The Lake Shore & Michigan Southern Railway Company, [SEAL.]

{ LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY SEAL. } By NICHOLAS BARTLETT,
Secretary pro tem.

25 NORTHERN DISTRICT OF OHIO, *ss:*

I, Earl Bill, clerk of the circuit court of the United States within and for said district, do hereby certify the within to be a true copy of the original bond in error, filed in the clerk's office of said court and now remaining therein, together with the endorsement of approval thereon, in a certain action lately pending in the court aforesaid, wherein the Lake Shore & Michigan Southern Railway Company is plaintiff, and Peter Rose is defendant.

Witness my official signature and the seal of said court, at Cleveland, in said district, this 19th day of February, A. D. 1875.

[SEAL.] EARL BILL,
Clerk of said Circuit Court.

(Indorsed:) No. 2231. Lake Shore & M. S. R'y Co. v. Peter Rose. Bond in error. Approved Jan'y 25th, 1875. M. Welker, judge of circuit court.

26 Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the seventh circuit and northern district of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of a judgment in a plea which is in the said circuit court, before you, between The Lake Shore and Michigan Southern Railway Company, plaintiff, and Peter Rose, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint *complaint* appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the first Monday in the month of October next, in the said Supreme Court, then and there to be held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that

error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 18th day of January, in the year of our Lord on' thousand eight hundred and seventy-five, and of the Independence of the United States of America the 99th.

[SEAL.] Attest: EARL BILL,
Clerk of said Circuit Court.

27 (Indorsed:) Lake Shore & Michigan Southern Railway Company vs. Peter Rose. Writ of error. Ja's Mason, att'y for pl'ff in error.

NORTHERN DISTRICT OF OHIO, *ss:*

The answer of the judges of the circuit court of the United States within named.

An authenticated transcript of the judgments, and all things concerning the same, and of the original files and pleadings within mentioned, are annexed to this writ, and herewith returned as within commanded.

Attest: EARL BILL,
Clerk of said Circuit Court.

28 The United States of America to Peter Rose, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, within & for the northern district of Ohio, wherein the Lake Shore and Michigan Southern Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Martin Welker, one of the judges of the said circuit court, at Cleveland, this 26th day of January, in the year of our Lord one thousand eight hundred and seventy-five.

M. WELKER,
Judge of said Circuit Court.

29 NORTHERN DISTRICT OF OHIO:

I acknowledge service of the within citation.

GEO. WILLEY,
U. S. Att'y for said District, Att'y for Defendant.

CLEVELAND, *Jan'y* 27, 1875.

(Indorsed:) Lake Shore & Michigan Southern Railway Company vs. Peter Rose. Citation in error. James Mason, att'y for pl'ff in error.

30 In the Supreme Court of the United States.

THE LAKE SHORE AND MICHIGAN SOUTHERN Railway Company *versus* PETER ROSE. } In error.

And the Lake Shore and Michigan Southern Railway Company afore

said now comes and says that in the record and proceeding in the aforesaid case in the circuit court of the United States for the northern district of Ohio there is manifest error, in this, to wit:

1st. That the said court erred in sustaining the demurrer of the defendent to the petition of the plaintiff.

2d. There is also an error in this, to wit: That by the record aforesaid it appears that the judgement aforesaid given was given for the said Peter Rose, defendent, against the said Lake Shore and Michigan Southern Railway Company, plaintiff; whereas by the laws of the land the said judgement ought to have been given for the said plaintiff against the said defendent. And the said plaintiff prays that the judgement aforesaid may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by occasion of the said judgement.

JAMES MASON,
ESTEP & BURKE,
Att'ys for Pl'ff in Error.

(Indorsed:) The Lake Shore & Michigan Southern Railway Co. vs. Peter Rose. Assignment of errors. Ja's Mason, S. Burke.

(Indorsement on cover:) No. 51. The Lake Shore and Michigan Southern Railway Company, plaintiff in error, vs. Peter Rose, collector, &c. Cert. of division. N. Ohio C. C. U. S. Filed 23rd February, 1875.

[illegible]

CERTIFICATE OF DIVISION

Supreme Court of the United States.

No. 51.

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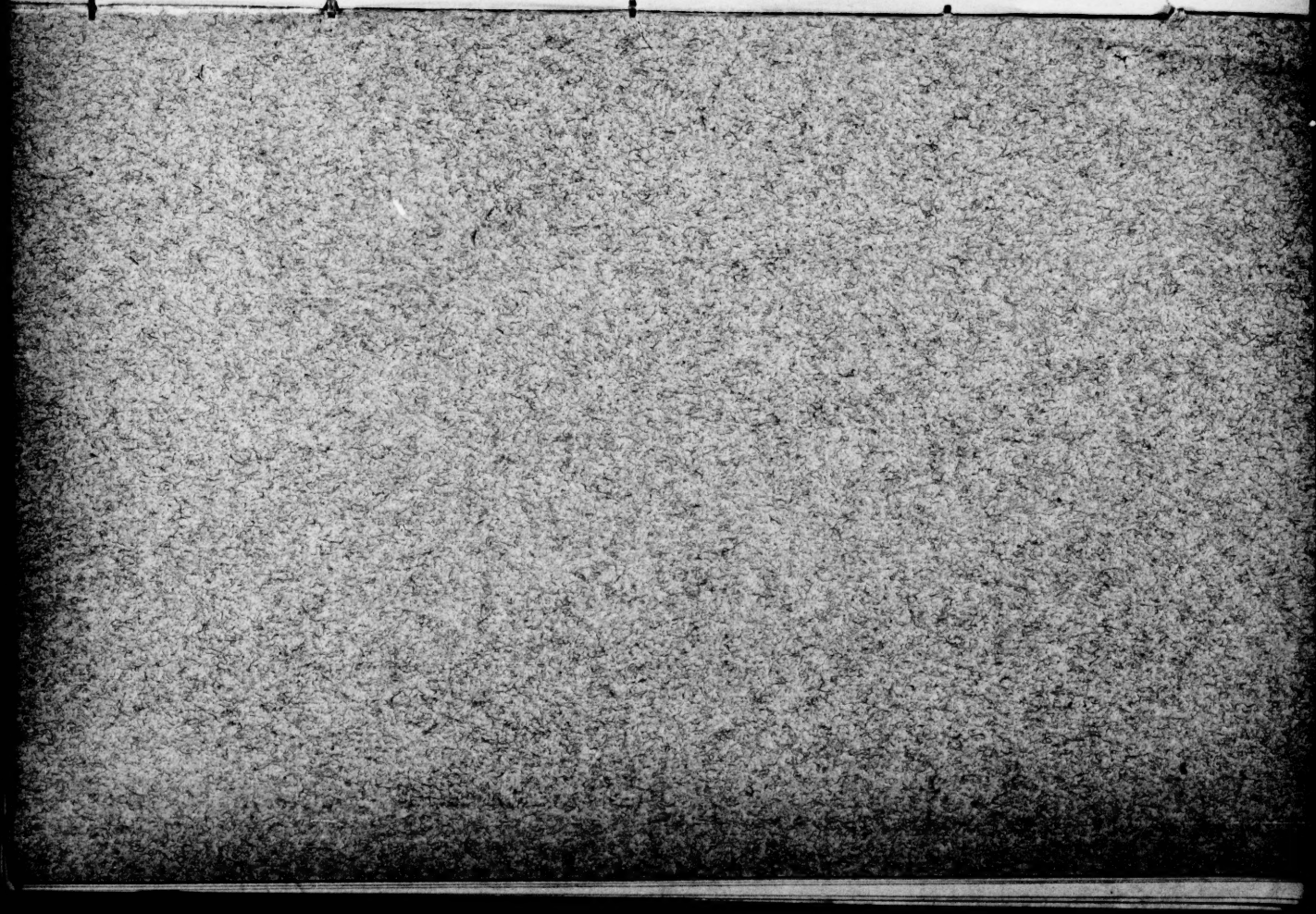
THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, Plaintiff in Error, vs. PETER ROSE, COLLECTOR, ETC.	In Error to the Circuit Court of the United States for the Northern District of Ohio.

Brief for Plaintiff in Error.

JAMES MASON.
Attorney.



In the
Supreme Court of the United States.

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THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO., Plaintiff in Error vs. PETER ROSE, Defendant in Error.	Error from the Circuit Court of the United Sates for the Northern District of Ohio.

Statememt of the Case.

The action is to recover money paid as a tax of five per cent. on the amount of coupons or interest warrants, all which became due in 1877, and prior to the passage of the Act of July 14th, 1870. See petition on page 4 and 5 of Record.

The payment was resisted by the Company but enforced by distraint seizure and sale of property, all which appears on the face of the petition.

It also appears that the Railway Company paid the coupons to the holders in full not withholding any tax.

The defendent demurred to the petition, assigning as ground of demurrer that the petition contained no facts sufficient to constitute a cause of action. Page 8 of Record.

The Court sustained the demurrer and decided that the tax on coupons which fell due July 1st, 1870, and which was paid by the Company without withholding five per cent. for Internal Revenue tax, was lawfully made. But the judges before whom

the case was tried differed in opinion upon that question and so certified.

The errors assigned are: (See page 12 of Record.)

1st. That the Court erred in sustaining the demurrer to the petition.

2d. That the judgment was given in favor of Defendant Rose, but should have been in favor of Plaintiff.

BRIEF.

The only questions which appear to me important to discuss are:

1st. Whether a law of Congress was in existence authorizing this tax on the 1st of July, 1870, when it was paid?

2d. Whether the Act of July 14th, 1870, passed on the day the tax was assessed, imposed the tax on the Railway Company?

The cases of Barnes vs. The Railroad, 17 Wallace, 294; of The United States vs. Railroad Company, page 322 of same volume; and the case of Stockdale vs. Insurance Company, page 323, 20th Wallace, with the dissenting opinions present the questions and the argument, and it would seem unnecessary to attempt fully to argue this case, in view of the fact that the same questions are fully discussed by different members of this Court in the cases referred to. I assume that in the above case of the United States vs. Railroad Company it is settled.

1st. That the tax in question claimed to have been imposed under Section 122 of the Internal Revenue Act of 1864 as amended by the Act of 1866, "is in substance and in law a tax upon the income of the creditor or stockholder, and not a tax upon the corporation," see page 327.

2d. That since the Railway Company under Section 122, under which this tax was assessed was only *made use of* "*as a convenient and effective instrument for collecting the taxes,*" if the holder of the bonds and coupons was not liable for the tax,

the Railway Company could not deduct the amount of the tax from the coupons it paid, and if it could not it did not owe the Government the tax, and its collection was without the authority of law. The case would be similar to the case of the city of Baltimore, referred to by the Court in Stockdale vs. Insurance Company, 20th Wallace 330, where Mr. Justice Miller says "It follows from this that when a dividend is declared to any shareholder whose dividend is for any especial reason exempt from such tax, as in the case of the city of Baltimore, or has stock in the Railroad Company, then the *corporation declaring the dividend is not liable.*"

II

The Act of July 14th, 1870 was passed fourteen days after the coupons fell due and were a portion of them paid, and on the very day on which the tax was assessed. Admitting the powers of Congress to be as ample in passing statutes retroactive in their effect as can possibly be inferred from the opinion of the Court on pages 331-2-3 in 20th Wallace, the tax in question could not be sustained. To compel this Railway Company to pay a tax *not its own* because it is made use of as a "convenient and effective instrument for collecting the same" after it had in good faith, in accordance with its contract paid over the money would be to violate its "constitutional rights," and would come within the exceptions to the power of Congress expressed in the opinion last referred to. It is not to be supposed that the officers of the Government will pretend that, if the power to assess this tax can only be derived from the Act of July 15th, 1870, it can reach back to interests paid before the the Act was passed.

III

It would seem clear that the Government, in order to sustain this tax, can claim to do it upon no other theory than that discussed by Mr. Justice Bradley in the case of Stockdale vs. Insurance Company, pages 333-4-5, to-wit, that the 119th Section of the Internal Revenue Act, which directed that the income tax should cease to be collected in 1870, did not apply to the taxes imposed by the 120th and 122d Sections. Without making special referrence to the contrary views expressed by other members of the Court in the cases above referred to. I submit that such contrary views are the only ones consistent with one or more of the decisions of the Court above referred to, and further suggest that a Railway Company having no more interest in the subject of the tax than any other debtor; and compelled by the statute to "be made use of as a convenient and effective iustrument for collecting the same," solely for the benefit of the Government; and which has in good faith paid the money without deduction as required by its bond, as justified by the most apparent and obvious construction of Section 119; ought not, through a doubtful construction of the statute to be compelled to bear the burden of others.

A construction which would compel it to pay under such circumstances what is nothing but the income tax of others, and which is in no sense its own burden, is not justified with as much plausibility as it would be to hold that by retroactive legislation it could be required to pay a tax upon dividends which it had earned and paid out.

In the one case it would be to charge upon it another's income tax without reason, and without the excuse of even apparent necessity. In the other, whether such a tax imposed after the dividend has been paid can or can not be fairly justified as rea-

sonable, it is imposed by reason of net gains which the corpora- has earned, and the tax paid can be withheld from the stock- holders out of future earnings, thus imposing the burden of taxation upon the stockholders who should bear it, and not as in the case before the Court upon the mere instrument used by the Government to enable it to conveniently collect the tax due from the creditors of the corporation.

JAMES MASON,
Attorney for Plaintiff in Error.

IN THE

Supreme Court United States.

No. 51.

The Lake Shore & Michigan Southern Railroad Company

vs.

PETER ROSE, Collector.

Error to the Circuit Court of the United States, for the Northern District of Ohio.

BRIEF IN REPLY TO THE SOLICITOR GERERAL,

By SHELLABARGER & WILSON,
Of Counsel for Plaintiff in Error.

Thomas McGill & Co., Printers, Washington, D. C.

In the Supreme Court of the United States.

Error to the Circuit Court of the Northern District of Ohio.—No. 51.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD COMPANY

vs.

PETER ROSE, Collector.

Plaintiff's Brief in Reply.

We venture to ask leave to put on file a brief notice, in the way of reply, of the argument of the Solicitor General in the above case.

Justice Strong, in his dissent in Stockdale *v.* Insurance Companies, (20 Wall., 336,) makes this statement:

"If it ever was claimed, it is no longer contended by any one that the tax on dividends and federal salaries, for the collection and payment of which provision was made by the 120th, 122d, and 123d sections of the internal revenue act of 1864 and its amendments, was not a tax upon incomes and a part of the income tax levied by the 116th section of the act."

The Solicitor's brief, pages 3 and 4, controverts what Justice Strong here states to be no longer denied by any one; and the Solicitor seems to still insist that such a tax as this five per cent. assessed on the interest coupons, and directed by said section 122 to be subtracted from the interest due to the coupon holder, is neither within the purview of section 116, nor a tax on the bondholder, but is a tax on the railroad itself.

It seems to us that what we have quoted above from Justice Strong ought to be accepted as settled. But since this is not accepted as settled, we venture here to state some propositions which appear to us to furnish a demonstration of two propositions, which we assert in reply to the Solicitor General. They are these:

1st. That the tax provided for in section 122 is not one on the corporation, but one on the corporation's creditor; and that the difference between its being held the one or the other is a difference of vital substance.

2d. That as a tax on such creditor it is an income tax to all intents, is within the purview of section 116, and within the limitations of section 119, and hence went out of existence 31st December, 1869, and renders the tax enforced against us illegal.

We consider these two propositions together.

(*a*) This five per cent. is incontestably within the *letter* of section 116, because that section levies "five per cent. upon the gains, profits, and income of every person residing in the United States," * * * "whether derived from *any kind of property*, rents, *interest*, dividends, * * * or from *any other source whatever.*"

The five per cent. named in section 122 comes exactly within this provision.

(*b*) Section 119, as found in all acts, (see 13 Stats., 283; 14 Stats., 138, 480,) carefully and expressly extends the limitation of the duration of the tax to every income tax "herein"—that is, *in the entire act*—imposed; and thus this limitation of such duration of the income tax is not only not confined by the wording of the act to incomes named in section 116, as the Solicitor asserts, but is, by the employment of the word "herein," (any where in the act,) most carefully and explicitly extended to every tax in the act which is on incomes. It may be profitable to refer to the previous legislation in connection with this question.

Section 90 of the act of July 1, 1862, (12 Stats. at Large, p. 473,) provided that there shall be collected, &c., upon the annual "gains, profits, or *income*, whether derived from any

kind of property, rents, *interest*," &c., a duty of three per cent. on all sums exceeding six hundred dollars and not exceeding ten thousand dollars, &c.

There cannot be a doubt that this covers *interest* on railroad bonds, as *income*.

To make this clearer, if by language it can be made clearer, in section 91, in making provision as to how the *income* to be taxed shall be made up, it is provided that there shall be "deducted" the *interest* on "any bonds of any railroad corporation which shall have been paid by the railroad company." That is to say, in making up his income, the party was authorized to *deduct* from his income the interest paid to him on railroad bonds, in case the railroad company had already paid the tax on that interest. If the railroad company had not paid the tax, no such deduction could be made. The interest was embraced in his income returns, and the party paid the tax himself. It is, therefore, manifest that this act of 1862 made the tax on *interest* on railroad bonds an *income tax on the person holding the bond and receiving the interest.*

Section 116 of the act of 1864 corresponds with section 90 of the act of 1862 above referred to. This section provides that there shall be collected from the "*income*," * * "whether derived from any kind of property, rents, *interest*, &c., three per cent.," &c.

This language certainly embraces interest on railroad bonds, just as did the language of section 90 of the act of 1862.

Then section 117 of the act of 1864 corresponds with section 91 of the act of 1862, and again makes it clear that interest on railroad bonds was to be regarded as a part of the income of the holder of the bonds, and to be taxed as such, for it provided that in estimating the annual income, there "shall be *deducted* the income derived from "the *interest* on any bonds of any railroad company," "which shall have been assessed and the tax paid *as hereinafter provided.*"

Now, let it be particularly observed that the italicised words, "*as hereinafter provided*," last above quoted from section 117, do not occur in section 91 of the act of 1862. Section 91 authorized the party to "*deduct*" from his income

the interest on his bonds, if the tax on that part of his income had already been paid by the company, but it did not provide that the railroad company should pay it. While section 117, in dealing with this part of the income, did make provision that he might "deduct" from his income that interest received by him, upon which the company had paid the tax "as hereinafter provided;" and then by section 122 the provision is made for collecting this tax on interest. That mode is, in brief, by the company paying it, and then collecting it back from the party to whom the interest is payable, by withholding from him the interest due to him to the extent of the tax paid.

It is inconceivable that this can, under this legislation, be regarded as a tax upon the railroad company. The very fact that the railroad company, after making the payment, is authorized to reimburse itself in the amount paid, by retaining the amount from the holder of the bond, in itself shows that it was the intention of Congress to make this a tax on the income of the holder of the bond. To levy a tax on one person, and then allow him to get the money back from another, would certainly be an anomaly in legislation.

Section 92 of the act of 1862 provides, when the "duties on incomes herein imposed" shall be payable, how long they shall continue, &c. Surely the "duties herein imposed" embrace the tax on bonds above alluded to.

Section 119 of the act of 1864 corresponds with section 92 of the act of 1862; makes provision for the time when the "duties herein imposed" shall be leviable and payable, the length of time they shall continue, &c.

The duties "herein imposed" certainly embrace this tax on income from railroad bonds above referred to.

This section 119 is amended by the act of 1867, so as to make the taxes "herein imposed" terminate with, &c., the year 1870.

Hence, we submit that the tax in question is a tax upon the holder of the bond, and could not be collected under the provisions of the law.

(*d*) The position of the Solicitor, which we resist, says that the income, although it be that of the poor, from investments in savings institutions, and others named in section 120, (14 Stats., 138,) and in turnpike companies, and the other like companies named in section 122, (14 Stats., 138,) and also the salaries of the twelve-hundred-dollar clerks, and the other salaries named in section 123, (14 Stats., 480,) Congress designed to continue to tax to the end, and to the extent of this five per cent., whilst it meant to put an end to the tax upon the other incomes, however, amounting to hundreds of thousands per year, which arose from "any and every" other "kind of property, rents, interest, dividends, salaries, or from any profession, trade, employment, or other source whatever." (14 Stats., 498.)

An interpretation working inequalities so revolting as these will never be adopted, when the language of the statutes allows any escape.

The canon for interpretation of laws, which declares that "all laws are intended to produce results conformable to the general idea of justice," being the very first of Domat's, and which is so forcibly appealed to by Justice Strong, (20 Wall., 337,) is one that no court and no State can afford ever to forget, and which, forgotten, turns the statute into a despotism.

(*e*) This court has, by eight of its judges, (see 20 Wall., 337,) decided that the tax imposed by section 122 is not a tax on the corporations named, but upon the creditor of the corporation; and the corporation is made use of as the mere "convenient means" for making the collection.

United States *v.* Railroad Co., 17 Wall., 323.

(*f*) To test the soundness of the last-preceding proposition, and to show the difference, in substance, between calling this tax, imposed by section 122, a tax on the corporation and one upon the creditor, we further suggest that to call the tax one upon the corporation, renders all that part of the section directing the tax to be withheld from the coupon holder, palpably unconstitutional. How would a tax law sound which

reads thus: "Congress hereby levies on all railroad companies a tax of five per cent. on their incomes; but since this is too high, the said companies are hereby authorized to deprive their creditors of their dues to an amount equal to one half of the tax?"

This would be a gross attempt at legislating away contracts, and would not stand the test of a moment's consideration. But the only way to render section 122 something else than this, is to make it, and section 116, impose a five-per-cent. tax *on the income of the creditor*, as derived through the railroad, and not a tax on the corporation. This shows that this tax, considered as one on the corporation, but one to be got back by such corporation by robbing some creditor, is a constitutional impossibility, simply because the Constitution has rendered it impossible for Congress to say: "Whereas I think I have taxed railroads too high in the past, therefore I hereby authorize such roads to reimburse these taxes by refusing to pay to their creditors to an amount equal to said taxes." This also shows that it is a matter of substance, vital to the validity of the section, which makes section 122 a tax on the creditor, and not on the corporation.

We contend, that if section 122 is construed to be a tax on the corporation, it makes the section unconstitutional, because, if it is tax on the corporation, the creditor is under no obligation to pay it, and therefore, when the act provides for the company withholding from the creditor an amount equal to that tax, it is an impairment of the creditor's contract to that extent. If it is construed as a tax on the income of the creditor, the act is free from constitutional objections. We need not argue, nor cite authorities to show, that if an act will bear either of two constructions, one of which would make it unconstitutional, and the other not, the latter will be adopted.

What we have now stated, if our positions are sound, results, as applied to the case at bar, in this:

(1.) That our creditors, owning the $185,590 in interest coupons, (accrued from January 1 to July 1, 1869, record, p. 4,) were owners of an income on which the five per cent. tax had expired by the terms of section 119, and they owed

no tax thereon, and hence none could be kept back by the railroad company. (See Justice Miller, 20 Wall., 330.)

(2.) On and prior to 10th of July, 1870, our road had paid over to its creditors every dollar of this $185,590 of interest, (see record, p. 4,) so that the railroad, the creditor, and the Government stood in this position—that the railroad had in its hands not a farthing of interest owing to any creditor, the creditor owed not a farthing of tax to the Government, and the Government had no statute taxing this $185,590, so properly paid over.

(3.) Four days after this became the status of the parties, Congress made the act of July 14, 1870. (16 Stats., 261.) Congress here made a law which causes the taxes imposed by sections 121, 122, and 123 to continue to be imposed up to August 1, 1870; that is, said section 122 had heretofore imposed a tax of five per cent. *on the owner of these* $185,590 *of interest coupons, and had not imposed a cent of tax on the railroad company therefor, but had simply made the railroad the agent to aid in collecting tax owing by the creditor*, (17 Wall., 322;) and this act of July 14, 1870, *reimposes the same five per cent. on the said owner of said* $185,590 *of coupons*, and authorizes the company to withhold this interest, so taxed, as the taxes of the creditor. But, when this law was passed, this $185,590 *had already all been paid over*, (record, p. 4,) and could not be withheld. Hence, most manifestly, if The United States against Railroads, (17 Wall., 322,) be law, then the act of 14th July, 1870—(*a*) imposes no tax on this railroad; (*b*) imposes no duty as to withholding the tax on the already paid over $185,590 of interest, because section 122 never authorized or required five per cent. of the interest to be withheld which had been paid over before the section was a law.

When Stockdale *v.* Insurance Company gives the 17th section of act of 14th July, 1870, the effect of continuing in force the 122d section, it does not make it take effect as a statute upon *things wholly outside of the terms of the statute.* Section 122 never did or could operate on moneys paid over by the corporation before such section was a law, because it could

operate, by its nature and terms, *only* on money the corporation held when the section was in force, and which the corporation could withhold. Therefore, evidently, when section 17 of act of 14th July became a law, reviving section 122, it could not bring within its scope moneys paid over when the law took effect.

Thus, it seems to us that it is demonstrably plain that the act of 14th July imposed neither a tax on our company nor a duty to withhold five per cent. of interest already paid over before the law was passed, because neither of these things were done by section 122, so simply continued in force by said act of 14th July.

This view makes it unnecessary to consider whether Congress could constitutionally impose a tax on a mere agent, on account of property once held for his principal, but after such property has completely passed away from the agent. Congress has not attempted to do this, but only to continue a section in force which this court says (17 Wall., 322) never did tax the agent, and never did more against such agent (the railroad company) than make it a "covenient means" of collecting the tax, but never did require such collection by the agent as to interest lawfully and property paid over before section 122 became a law.

What the Solicitor's brief (pp. 2 and 3) says about the petitions disclosing that our company had, on and after 14th July, 1870, principal and interest belonging to these owners of the $185,590 of interest coupons, out of which the company might have indemnified itself had it paid the five-per-cent. tax enacted on 14th July, and having no existence before, is founded, we submit, in utter mistake. There are many answers to this position. One conclusive one is, that all such laws as this, so invasive of common rights of property, are *strictly construed*, and never extended beyond the express terms of those extraordinary grants of power.

See 21st American Rule of Construction, Potter's Dwarris, p. 146.

Section 122 neither taxes nor hints at taxing any part of

what was owing to these coupon-owners, save this $185,590 interest on the bonds as and when payable. It neither suffers nor hints at suffering our company to hold back any interest or principal, save *out of the interest on which the five per cent.* is assessed. And for the Solicitor to suggest that we, as the mere "convenient means" of aiding the Government to collect a tax off of one of our creditors, might have done so by our levying the tax on moneys the law did not levy it on, and then might have withheld it out of moneys the law did not suffer us to withhold it out of, is, to say the least, to put the second law officer of the Government in a position not usually occupied by *him* in the courts of the country.

SHELLABARGER & WILSON,
Of Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

THE LAKE SHORE AND MICHIGAN Southern Railway Company, plaintiff in error,
vs.
PETER ROSE, COLLECTOR, &C.

No. 51

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

THE LAKE SHORE AND MICHIGAN Southern Railway Company, plaintiff in error,
vs.
PETER ROSE, COLLECTOR, &c.

No. 51

In error to the circuit court of the United States for the northern district of Ohio.

BRIEF FOR THE UNITED STATES.

The circumstance in which the present case differs from others heretofore decided by this court upon the operation of the internal-revenue tax act of July 14, 1870, sec. 17, is that it appears that the interest upon which *this* tax was exacted had at the time of the passage of such act *already been paid* by the company to its creditors.

Hereupon it is suggested that the act had no operation upon the present case, inasmuch as to interpret it so were to make it so far unconstitutional.

1. This proposition, so far as important in the present case, assumes that the tax in question owes its exist-

ence to the act above cited, and is not sanctioned by any previous statute; for instance, that of June 3, 1864, sec. 122.

I understand that this point has not been so decided by this court. The contrary view was expressly taken by Mr. Justice Bradley and the Chief-Justice in the Stockdale cases, (20 Wall., 323,) and although the other members of the majority who ruled those cases put their conclusions upon a different course of reasoning, such reasoning implies no more than that it was considered unnecessary to go back of the act of 1870, under which, as was admitted by *all* the members of the majority, such tax was valid. Therefore, if a similar case of taxation were to arise in which the act of 1870 did not apply, there is nothing in its past action to hinder the court from referring the authority to levy such tax to the act of 1864. And, if the present, in the view of the court, be such a case, I need only adopt here the argument contained in the opinion of Mr. Justice Bradley, (concurred in by the Chief-Justice,) beginning at page 333 of the 20th of Wallace.

2. However, I submit that the act of 1870 is competent authority for the exaction in question.

It is not necessary to say whether an act of Congress passed under the circumstances supposed by the learned counsel to exist here would be unconstitutional. Those circumstances are, a tax levied by statute upon a mere agent, in respect of a sum of money which had been paid to the principal before the statute was enacted, such payment having *closed* the connection between the parties. I am under no need to discuss the power of Congress in such a case, for the "petition" of the com-

pany (demurred to by the United States) makes out none such. It states (Record, p. 4) that the company was indebted "*in divers sums of money evidenced by bonds,*" &c., &c., "*with the interest-coupons thereto attached;*" and "*that interest-coupons representing the interest accrued on said bonds from January 1 to July 1, A. D. 1870, had become due to the amount of $185,590 on the said 1st day of July, A. D. 1870; that the said plaintiff paid the said interest as the said coupons were presented to it, on said 1st day of July,*" &c.

From this statement I submit that it appears that after the payment of the July coupons, 1870, there still remained in the hands of the company other money (for principal and interest) which belonged to the creditors, and out of which the company could indemnify itself for what it had, on account of such bonds and coupons, been compelled as above to pay; the more that it does not appear upon the pleadings that these were negotiable.

To have imposed the tax in question under such circumstances need not have operated even *harshly.* But at all events, whether harsh or not, the act appears therein to be strictly *constitutional.*

3. It remains to say that in reaching the conclusion just controverted the learned counsel for the plaintiff in error has assumed that the tax in question is imposed only *formally* upon the company, but *really* upon the creditor. For this he quotes language used by this court in the case of Baltimore and Ohio Railroad Company *vs.* The United States, (17 Wall., 322.)

True as the expression quoted by him may have been as applied to the case just cited, and also, in a general

sense, in like cases, I submit that the comment made upon this point in the opinion delivered by the court in the Stockdale cases (20 Wall., 323) shows that however it may be as between the company and its creditors, yet as between the United States and the company the latter is in general a *principal* debtor for the tax; the court saying in that connection, (page 331,) "*The right of Congress to impose this tax by a new statute, although the measure of it was governed by the income* [of the corporation] *of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed.*"

It follows, therefore, that the circumstance that Congress chose to ascertain the taxable gains of this company for the first six months of 1870 by referring, among other things, to the amount of money in its hands on the 1st day of July for the satisfaction of creditors, or even to that then actually paid by it to them, is, like the question whether the tax itself is *on the creditor* or *on the corporation*, "one of form rather than substance;" and, in conclusion, that the competency of such action does not depend upon the question whether such money has disappeared from the hands of the tax-payer before the enactment of the statute.

S. F. PHILLIPS,
Solicitor-General.

In the Supreme Court

OF THE UNITED STATES.

KEOKUK NORTHERN LINE PACKET COMPANY,
Plaintiff in Error,
vs.
CITY OF KEOKUK, IOWA,
Defendant in Error.

At Law.

Writ of Error to Supreme Court of the State of Iowa.

GILLMORE & ANDERSON, Attorneys for Plaintiff in Error.

CRAIG & COLLIER, Attorneys for Defendant in Error.

BRIEF OF GILLMORE & ANDERSON.

The plaintiff in error, the Keokuk Northern Line ...ket Company, a corporation of the State of Missouri, th... sued in the District Court of Lee County, Iowa, by p...endant in error, the City of Keokuk, Iowa, for $286, ... wharfage on boats belonging to plaintiff in error, ...avigating the Mississippi River from St. Louis, Missouri, ...o St. Paul, Minnesota, under the ordinances of the City of Keokuk, a municipal corporation, existing by virtue of as pecial charter, from the Legislature of Iowa. That as

such municipal corporation, by virtue of its charter, it was empowered to establish and regulate wharves and fix the rates of landing and wharfage of all boats, &c., landing at its wharves. That it had built a wharf about one thousand feet along the line of the river, at the levee, within the bounds of said city, and had paved same, and expended large amounts of money in building same, in making additions to same, and in keeping same in repair, amounting in all to $17,751.06, and on November 1st, 1868, the city issued $29,000, 8 per cent bonds, for the wharf improvement. That said bonds having been negotiated, and proceeds expended on wharf, to meet the principal, and to pay interest on such bonds, it was necessary for the city to fix a wharfage fee, to be paid by boats, &c. And on the 26th day of February, 1872, the City Council passed ordinance fifty nine, (a copy of Sec. 3 was made part of the petition.) That the interest amounts to $2,320 per annum. That the actual income for wharf is not more than sufficient to pay interest on such bonds. That the defendant's boats landed at the improved wharf, and occupied same for the purpose of receiving freight and passengers, and the wharf-master at each landing demanded wharfage under said ordinance during the month of July and August, 1875, on the following boats, at the following rates:

On the Steamer Damsel, a boat of 200 tons, at $5 landing; Steamer Andy Johnson, a boat of over 400 to burden, at $5 a landing; the Steamer Minneapolis, boat of over 400 tons burden, at $5 a landing; J. H. Johnson, a boat of over 400 tons, at $5 a landing; Lake Superior, a boat of over 400 tons, at $5 a landing; Rob Roy, a boat of over 400 tons, at $5 a landing; Northwes-

tern, a boat of over 400 tons, at $5 a landing; Belle of LaCrosse, a boat of over 400 tons, at $5 a landing; Dubuque, a boat of over 400 tons, at $5 a landing; Clinton, a boat of over 400 tons, at $5 a landing; Alex. Mitchell, a boat of over 400 tons, at $5 a landing; Red Wing, a boat of over 400 tons, at $5 a landing; Minnesota, a boat of over 400 tons, at $5 a landing; Muscatine, a boat of over 300 tons, at $4 a landing; Savanna, a boat of over 300 tons, at $4 a landing. Amounting in the aggregate to $286.

Plaintiff in error in said suit answered, admitting the city of Keokuk was a municipal corporation under a special charter. That defendant was a corporation organized under the law of Missouri, and was engaged in navigating the Mississippi river with steamboats. It admits it landed its boats at Keokuk; admits that the wharfage was charged under the city ordinances of Keokuk; admits defendant has refused to pay such wharfage, and it sets up and makes part of its answer sections 1, 2, 3 and 4 of the city ordinances, relating to the collection of wharfage by the city, as follows:

Be it ordained by the City Council of the City of Keokuk:

SECTION 1. That all the ground now lying or which shall be made hereafter, between Water street, in said city of Keokuk, and the middle of the main channel of the Mississippi river, throughout the entire length of said city, is hereby declared a wharf and subject to be used for such purposes, and under such terms as are or may be prescribed by ordinance.

SEC. 2. That the whole of Water street, as well as the land described in the foregoing Section, is hereby declared open for the free use and purposes of a wharf, and subject to all the rules and regu-

lations prescribed by ordinance for the government and regulation of the wharf of the city of Keokuk, and all boats, rafts and water craft of every description whatever, that are moored to or landed at any part of Water street, and the persons owning, claiming and having charge of the same, shall be subject to the same rules, regulations, wharfage and penalties as are provided by this ordinance in relation to boats, rafts and other water craft landing or mooring at the wharf as defined by the third Section of this ordinance; *Provided,* Nothing contained in this Section shall be construed to interfere with the use of Water street as a public street.

SEC. 3. That any steamboat which shall make fast to any part of said wharf or Water street, or to any vessel or other thing at or upon said wharf or street, or shall receive or discharge any passengers or freight thereon, or shall use any of said wharf or street for the purpose of discharging, receiving or landing any freight or passenger, shall, if the tonnage of said boat be less than fifty tons, be liable to a wharfage fee of one dollar; if the tonnage of said boat be less than one hundred tons, and more than fifty tons, the same shall be liable to a wharfage fee of one dollar and fifty cents; all boats of one hundred tons and less than two hundred tons, shall be liable to a wharfage fee of two dollars; all boats of two hundred tons and less than three hundred tons, shall pay a wharfage fee of three dollars; all boats of three hundred tons, and less than four hundred tons, shall pay a wharfage fee of four dollars; and all boats of four hundred tons and upwards, the sum of five dollars; and all boats that shall remain at said wharf or street over two and less than five days, shall pay a wharfage fee of one dollar and fifty cents for each day after the first two days; and should said boat remain at said wharf or street over five days, said boat shall be liable to a wharfage fee of one dollar per day for every day it may remain at said wharf or street over five days. *Provided,*

That the City Council may fix by resolution the sum to be paid as wharfage by boats plying regularly between the city of Warsaw, Alexandria or Nauvoo—said wharfage fees to be paid by the owner, captain, clerk, mate or agents of said boat to the Wharf-master, or his deputy; *Provided, further,* That boats engaged only in towing rafts, and only land at the wharf for the purchase of fuel or stores, for its own use, shall be exempt from wharfage.

SEC. 4. That all crafts usually known and denominated barges, canal boats or keel boats, used in the carrying trade, whether in tow or otherwise, landing at the wharf of the city, shall be charged wharfage in accordance with their tonnage or carrying capacity, the same rates as are charged steamboats.

And further answering plaintiff in error averred that the boats named in the petition were each of more than twenty tons burden; were employed in navigating the Mississippi river from St. Louis, Missouri, to St. Paul, Minnesota; engaged in commerce between the States of Minnesota, Iowa, Wisconsin, Illinois and Missouri, and landed at Keokuk, one of its regular ports; and while so employed, and during the time set out in the petition, were duly licensed and enrolled for the coasting trade, under the acts of Congress for the regulation of commerce. That the ordinance under which plaintiff claims wharfage was and is illegal and void, and in violation of the constitution and laws of the United States, and such wharfage tax is illegal, and plaintiff has no right to recover same from defendant.

To this answer defendant in error demurred, because ordinance 59, under which plaintiff claims it is not illegal, and does not conflict with the provisions of the Constitution of the United States, or the laws of Congress.

The Demurrer was sustained by the District Court, in which said suit was brought.

Plaintiff in error duly excepted to said ruling, and thereupon final judgment was rendered in said District Court for $289, which was duly excepted to.

Plaintiff in error thereupon duly appealed said cause to the Supreme Court of Iowa, and upon hearing it was affirmed by said Supreme Court, and thereupon a writ of error was duly allowed to said Supreme Court of Iowa, by the Chief Justice thereof, to take said case to the Supreme Court of the United States, because the decision therein was as claimed against a right claimed by plaintiff in error, under the constitution of the United States, and acts of the United States Congress.

The question presented by said demurrer is now presented to this court. Whether or not the court erred in sustaining said demurrer and holding said ordinance was valid, and not unconstitutional and void.

ASSIGNMENT OF ERRORS.

We claim that the District Court erred in sustaining said demurrer; that the Supreme Court of Iowa erred in affirming said judgment, and that—

1. This wharfage tax is a duty on tonnage or the carrying capacity of the vessel, as levied by the ordinance so much per ton, (sections 3 and 4) and is contrary to article 1, section 10, second clause of the Constitution.

2. That a tax on the vehicle of commerce is as much a duty as if levied on the articles exported from any State,

and that the ordinance is contrary to article 1, section 9, of the Constitution.

3. That by said section 9, it is expressly provided that a vessel bound to or from one State shall not be obliged to enter, clear, or pay duties in another, and the ordinance is contrary to that clause.

4. That it is contrary to section 8 of the Constitution, whereby Congress is given power to regulate commerce among the States.

5. That it is contrary to the compact contained in the ordinance of 1787, the organic law of Wisconsin and Iowa, and the act of Congress admitting Iowa into the Union, in that it seeks to levy a tax for the navigation of the river, the free public highway of the Union, (from a citizen of a foreign State) it being impossible to navigate the river without stopping at ports on the river.

6. That it is contrary to the act of Congress whereby vessels are enrolled and licensed for the coasting trade, and are American vessels, paying a tax on tonnage, at the time of license, and as such are entitled to enter any port of the United States without any tax or toll for the privilege of so entering.

And that being contrary to the constitution and acts of Congress, the ordinance is void, and no right to the city can accrue therefrom, and the court should have overruled said demurrer.

ARGUMENT FOR PLAINTIFF IN ERROR.

The question presented by the demurrer is simply

whether the ordinance of the city of Keokuk, under which the wharfage tax is assessed against defendant, sued for in this case, is in conflict with the constitution and the acts of Congress of the United States? Defendant submits the proposition that there is such conflict. The provisions of the constitution and the several acts of Congress, upon which such claim is based, are as follows:

CONSTITUTION, Article 1, Section 8. * Congress shall have the power to levy and collect taxes, duties, imposts, and excises. * * All duties, imposts and excises shall be uniform throughout the United States.

To regulate commerce with foreign nations and among the several States.

SECTION 9. * * No tax or duty shall be laid on articles exported from any State. * * Nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

SECTION 10. (Second Clause.) No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. And the net produce of all duties and imposts shall be for the use of the treasury of the United States, and all such laws be subject to the revision and control of Congress. *No State shall, without the consent of Congress, lay any duty of tonnage.* * *

ORDINANCE OF 1787. * * It is hereby ordained and declared * that the following articles shall be considered as articles of compact between the original States and the people and States in said territory, and forever remain unalterable, unless by common consent, to-wit;

* * ARTICLE 4, (Last Clause.) * * The navigable waters lead-

ing into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of said territory, as to the citizens of the United States, and those of any other State that may be admitted into the Confederacy, without any tax, impost or duty therefor.

ORGANIC LAW OF WISCONSIN, Approved April 20, 1836, comprising Iowa now:

Section 12. And be it further enacted, that the inhabitants of said territory shall be entitled to and enjoy all and singular the rights, privileges and advantages granted and secured to the people of the territory of the United States, northwest of the river Ohio, by the articles of the compact contained in the ordinance for the government of the said territory, passed on the 13th of July, 1787, and *shall be subject to all the conditions and restrictions and prohibitions in said articles of compact imposed upon the people of said territory.*

ADMISSION OF IOWA, * Act approved March 3, 1845:

Section 3. And be it further enacted, That the said State of Iowa shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the State of Iowa, so far as said river shall form a common boundary to said State, and any other State or States now or hereafter to be formed or bounded by the same, such river to be common to both. *And that the said River Mississippi, and the navigable waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost or toll therefor, imposed by the said State of Iowa.*

Revised Statutes of United States, 1875, page 838, Sec. 4,311, provides:

"Vessels of twenty tons burden and upward, enrolled in pursuance of this title, and having a license in force * * as required by this title and no others, shall be deemed vessels of the United States, entitled to the privileges of vessels employed in the coasting trade or fisheries."

Section 4,320 provides for the payment of six cents per ton upon granting a license.

The boundaries of the city of Keokuk, as provided by amended charter, July 25th, 1856, Laws of 1856, Iowa, chapter XVII, page 42, are:

Section 1. That the boundaries of the city of Keokuk shall be hereafter as follows:

Commencing at the middle of the main channel of the Mississippi river at a point where the north and south line between sections 33 and 34, township 65, north range 5 west, would cross said channel, if extended far enough south to do so; thence north to the northwest corner of section 15; thence east on the section line to the middle of the main channel of the Mississippi; thence down the middle of the main channel of the said river to the place of beginning.

Section 3. That the city of Keokuk shall have the exclusive right to make wharves and collect wharfage, and regulate wharf rates on the *river banks*, which is added to said city by this act.

By such amended charter the boundaries of the city were extended so as to take in about six and a half miles of river front, from a point in the middle of the north line of section 13, township 65, north range 5 west, (first in a southeasterly direction, and then in a southwesterly direction,) to near the southwest corner of section 34, town-

ship 65, north range 5 west, in Lee county, Iowa; and the city, by section 3 of the same amendment, was given the *exclusive* right to make wharves and collect wharfage from vessels on the *river banks*, added to the city by said act.

By virtue of the authority in her charter, the city of Keokuk on February 26, 1872, passed the ordinance relative to wharf and wharfage, under which she claimed from plaintiff in error. By section 1 of that ordinance the city declares what shall be wharf, to-wit: "All the ground lying between Water street and the middle of the main channel of the Mississippi river, throughout the entire length of the city."

Section 2 provides that the whole of Water street, as well as the land described in section 1, shall be wharf, and that all boats that are moored to or landed at any part of Water street, shall be subject to section 3, and that nothing therein shall interfere with the use of Water street as a street.

Section 3 provides that any boat which shall make fast to any part of said wharf, or to any vessel or other thing at or upon said wharf or street, *or* shall receive or discharge any freight or passengers thereon, if the tonnage of the vessel be 50 tons, shall pay $1.00; if 100 tons, $1.50; if 200 tons, $2.00; if 300 tons, $3.00; if 400 tons, $4.00; if more than 400 tons, $5.00; and it is provided that *boats* engaged only in *towing* rafts, landing *only* for the *purchase of fuel and stores*, shall be *exempt from wharfage*.

Section 4 provides that barges, canal boats or keel boats, *used* in the *carrying trade*, whether in tow or otherwise, landing at the *wharf*, shall be charged wharfage in

accordance with their tonnage or carrying capacity, the same rates as are charged steamboats.

Under this ordinance, then, it is provided that six and one-half miles of the *free Mississippi* river shall *not be free* to persons navigating the river—that no person may use the bank to land to, unless they pay a toll to the city of Keokuk—no matter where in that six and a half miles they land, or whether they land at all or not, they are liable for the tax, should they send a skiff ashore with a passenger or a trunk. It is a toll for the privilege of arriving at and departing from the port. It is not for the use of a wharf or dock—none have been constructed—and it makes no difference as to liability for wharfage whether the boat lands where the city has paved Water street or not.

The constitutional provision aforesaid, and the acts of Congress cited, we claim prohibit any State, or any authority under any State, from levying any tax or duty on vessels, or, in other words, upon tonnage of vessels, among others, engaged in the coasting trade of the United States, navigating the Mississippi river; that that river is a free public highway, and may be navigated by any citizen of the United States without any tax, duty, impost or toll whatever, levied by any State or municipality, and that the ordinance in question is within the prohibition aforesaid, and by it the city seeks to levy an illegal tax.

In the formation of the Government of the United States, it was necessary to maintain its existence, that means should be provided for the expenses thereof.—It was necessary in order that there should be perfect equality among the several States, that the commercial

regulations should be uniform throughout the United States, and that the seaboard States might not have it in their power to levy a tribute upon the interior States.—Congress was, therefore, empowered to regulate commerce with foreign nations, and among the several States; was empowered to levy duties on exports and imports, and that its power to levy such taxes might not be interfered with, the several States were prohibited from levying any tax or duty on imports or exports, and as a precautionary measure, so that the States might not indirectly do what they were prohibited from doing directly, it was provided, "no State shall levy any duty of tonnage," or, in other words, upon the instruments used in exporting or importing, which would have the same effect as if levied directly on imports and exports, the property so transported, as export or import, in the end having to pay the tax on the instrument or vehicle used in its transportation.

Congress may levy a tax on tonnage, and does so at the time when vessels are licensed. All the boats described in the petition have been duly licensed and enrolled, and were American vessels, and entitled to all the privileges of American ships, among others the privilege of entering any port of the United States, without the exaction of any tax or toll for the privilege of entering or departing. These boats were engaged in commerce between the States, and as such had the right to enter the port of Keokuk without the payment of any tax.

Story on the constitution, Sec. 1016, 1018.

The numerous adjudications on these clauses of the constitution, hereinafter cited, demonstrate how many

different plans have been invented for the purpose of levying a tribute on commerce, and how carefully the provisions of that instrument have been upheld by State and Federal authority. Exclusive privileges to steam vessels, owned by certain parties in New York, by law of that State; passenger duties by Massachusetts and New York; quarantine duties by Texas; Portwarden's fees and wharfage dues by Louisiana; taxes on vessels by Alabama; stamps on bills of lading by California; importer's license by Maryland; wharfage by Minnesota; and they have all been held to be unconstitutional and void by the courts, as being in contravention of the provisions of the constitution or acts of Congress.

The constitutional provisions involved in this case have frequently been before this Court.

In the case of Gibbons vs Ogden, 9 Wheaton, 1, the question involved was whether or not several acts of the Legislature of the State of New York, enacted for the purpose of securing Robert R. Livingston and Robert Fulton the exclusive navigation of all waters within the jurisdiction of the State, with boats moved by fire and steam, for a term of years not yet expired, and authorizing an injunction to restrain any other persons from *navigating those waters* with boats of that description, were held by the Supreme Court to be repugnant to the constitution of the United States, wherein, by that instrument, Congress was given the power to regulate commerce among the several States. Ogden, assignee of Livingston and Fulton, enjoined, under the several acts of the New York Legislature, Gibbons, the owner of steam vessels navigating the waters between Elizabethtown, New Jersey, and New York City. The injunction

was held final by the court of last resort in New York, and the case was taken to the United States Supreme Court. The Supreme Court held that the power to regulate commerce in the Congress *included the power to regulate navigation;* that the laws of the State of New York, relied upon by Ogden, were inoperative and void—the majority of the court on the question that they were against the laws of Congress regulating the coasting trade, but Judge Johnson, while arriving at the same conclusion, based it upon the ground of being unconstitutional. The whole opinions of the court are applicable reasoning in this case, and we might quote the case entire.

On page 201 the court says:

"We must first determine whether the act of laying duties or imposts on imports or exports, is considered in the Constitution as a branch of the taxing power, or of the power to regulate commerce. We think it very clear that it is considered a branch of the taxing power. * * The power to levy taxes could never be considered as abridging the right of the States on that subject, and they might levy duties on imports or exports *had the Constitution not prohibited it.* * * A duty on tonnage is as much a tax as a duty on imports or exports, and the reason is the same. * * This tax may be imposed by a State with the consent of Congress."

Brown vs. State of Maryland, 12 Wheaton, 419, was where plaintiff in error was indicted for selling imported articles without taking out a license from the State of Maryland. It was held that the act was in conflict with the provisions of the constitution of the United States, which prohibits States from laying any imposts, &c., and

also with the clause which declares Congress shall have the power to regulate commerce.

In Smith vs. Turner, 7 Howard, 283, it was held that a State law which requires masters of vessels engaged in foreign commerce to pay a certain sum to a State officer on account of every passenger brought from a foreign country, is inoperative and void, by reason of its conflict with the constitution and laws of the United States.

On page 408, in closing their opinion, the court say:

"A tax or duty on tonnage, merchandise or passengers, is a reg-
"ulation of commerce, and cannot be laid by a State except under
"sanction of Congress, and for the purposes specified in the con-
"stitution."

In the case of Sinnot et. al., vs. Davenport, et. al., 22 Howard, 227, a law of the State of Alabama, requiring owners of steamboats navigating the waters of that State, before such boat should leave Mobile, to file a statement in the office of the Probate Judge of Mobile county, setting forth the name of the vessel, the name of the owner and his residence, and the interest each owner has in the vessel, was held to be in conflict with the act of Congress, so far as the law was brought to bear on a vessel duly enrolled and licensed under the act of Congress, and therefore unconstitutional and void, and that an act of Congress, passed in pursuance of the constitution, is the supreme law of the land, and any State law in conflict with it is inoperative and void.

In Almy vs. State of California, 24 Howard, 169, it was held that State law imposing a stamp duty on bills of

lading was a tax on exports, and that the law was unconstitutional and void,

In Steamship Co. vs. Portwardens, 6 Wallace, 31, it was held, a statute of Louisiana, enacting that the masters and wardens of a port, within it, should be entitled to receive, in addition to other fees, $5.00, whether called upon to preform any service or not, for every vessel arriving in port, is a regulation of commerce within the meaning of the constitution, and also a duty on *tonnage*, and was unconstitutional and void.

In the State Tonnage Tax Cases, 12 Wallace, 204, it was held that although taxes levied by a State upon vessels owned by its citizens, as property, and based on a valuation of the same, are not prohibited by the Federal Constitution, yet taxes cannot be imposed on them by the State at so much per registered tonnage. Such taxes are within the prohibition that no State shall levy any duty of tonnage without consent of Congress. On page 210 the court say:

Five steamboats were owned by plaintiffs, citizens of the State doing business at Mobile. All the boats were duly enrolled and licensed. * * Such steamboats are deemed ships and vessels of the United States, and as such, are entitled to the privileges secured to such vessels by the act of Congress providing for the enrolling and licensing ships and vessels to be employed in the coasting trade.

The steamboat C. W. Dorrance, 321 tons burden, valued at $5,000, was taxed $643.25; the Flirt, 214 tons, valved at $2,500, was taxed 429.25; showing the tax to

be one dollar per ton for State tax and the same for the county tax, and fees charged by the collector.

Two objections were made to the taxes by plaintiffs:

1. That the taxes as levied were in direct contravention of the prohibition of the United States Constitution, "that no State shall, without the consent of Congress, levy any duty on tonnage."

2. That the State law levying the taxes, violates the compact between the State and the United States, that all navigable waters within the State shall forever remain public highways, free to the citizens of said State and of the United States, without any tax, duty, impost or toll therefor, imposed by the said State.

The Supreme Court say on page 212:

"Congress has prescribed the rules of measurement for computing the tonnage of American ships and vessels. Viewed in the light of these enactments, the word tonnage, as applied to American vessels, must be held to mean the entire internal cubical capacity or content of the ship or vessel, expressed in tons of 100 cubical feet each."

And on page 215 the Court say:

"Tonnage duties are as much taxes as duties on imports or exports, and the prohibition of the Constitution extends as fully to such duties, if levied by the States, as to duties on imports or exports, and for reasons quite as strong as those which induced the framers of the Constitution to withdraw imports and exports from State taxation. Measures however, scarcely distinguishable from each other, may flow from distinct grants of power, as for example, Congress does not possess the power to regulate the purely internal commerce of the States, but Congress may enroll and license

ships and vessels to sail from one port to another in the same State, and it is clear that such ships and vessels are deemed ships and vessels of the United States, and that, as such, they are entitled to the privileges of ships and vessels employed in the coasting trade."

"Ships and vessels enrolled and licensed under that act are authorized to carry on the coasting trade, as the act contains a positive enactment that the ships and vessels it describes, and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the trade therein described."

"Evidently the word license, as used in that act, as the Court say in that case, means permission or authority; and it is equally clear that a license to do any particular thing is a permission or authority to do that thing, and if granted by a person having power to grant it, that transfers to the grantee the right to do whatever it purports to authorize."

"Unquestionably the power to regulate commerce includes navigation as well as traffic in its ordinary signification, and embraces ships and vessels as the instruments of intercourse and trade, as well as the officers and seamen employed in their navigation."

"Steamboats, as well as sailing ships and vessels, are required to be enrolled and licensed for the coasting trade, and the record shows that all the steamboats taxed in this case had conformed to all the regulations of Congress in that regard; that they were duly enrolled and licensed for the coasting trade, and were engaged in the transportation of passengers and freight within the limits of the State, upon waters navigable from the sea by vessels of ten or more tons burden."

"Tonnage duties, to a greater or less extent, have been imposed

by Congress ever since the Federal Government was organized under the constitution to the present time. They have usually been exacted when the ship or vessel entered the port, and have been collected in a manner not substantially different from that prescribed in the act of the State Legislature under consideration."

"Undisputed authority exists in Congress to impose such duties, and it is not pretended that any consent has ever been given by Congress to the State to exercise any such power."

"If the tax levied is a duty of tonnage, it is conceded that it is illegal, and it is difficult to see how the concession could be avoided, as the prohibition is express; but the attempt is made to show that the Legislature, in enacting the law imposing the tax, merely referred to the registered tonnage of the steamboats 'as a way or mode to determine and ascertain the tax to be assessed on the steamboats, and to furnish a rule or rate to govern the assessors in the performance of their duties.'"

"Suppose that could be admitted, it would not have much tendency to strengthen the argument for the defendant, as the suggestion concedes what is obvious from the schedule, that the taxes are levied without any regard to the value of steamboats. But the proposition involved in the suggestion cannot be admitted, as, by the very terms of the act, the tax is levied on the steamboats wholly irrespective of the value of the vessels as property, and solely and exclusively on the basis of the cubical contents, as ascertained by the rules of admeasurement and computation prescribed by the act of Congress."

"By the terms of the law the taxation prescribed is 'at the rate 'of one dollar per ton of the registered tonnage thereof.' Legislative enactments, when the language is unambiguous, cannot be changed by construction, nor can the language be divested of its

plain and obvious meaning. Taxes levied under an enactment which directs that a tax shall be imposed on steamboats at the rate of one dollar per ton of the registered tonnage thereof, and that the same shall be collected at the port where such steamboats are registered, cannot, in the judgment of this Court, be held to be a tax on the steamboat as property."

"On the contrary, the tax is just what the language imports, a duty on tonnage, which is made even plainer when it comes to be considered that steamboats are not to be taxed at all unless they 'are plying the navigable waters of the State,' showing to a demonstration that it is as instruments of commerce, and not as property, that they are required to contribute to the revenues of the State."

"Such a provision is much more clearly within the prohibition in question than the one involved in a recent case decided by this Court, in which it was held that a statute of a State enacting that the wardens of a port were entitled to demand and receive, in addition to other fees, the sum of five dollars for every vessel arriving at the port, whether called on to perform any service or not, was both a regulation of commerce and a duty of tonnage, and that, as such, was unconstitutional and void." * *

"Assume the rule to be as there laid down, and all must agree that 'the levy of the tax in question is expressly prohibited, as the 'schedule shows that it is exactly proportioned to the registered 'tonnage of the steamboats plying in the navigable waters of the 'State." * *

"For these reasons, the Court is of the opinion that the State law levying the taxes in this case is unconstitutional and void, that the judgment of the State Court is erroneous, and that it

must be reversed; and, having come to that conclusion, the Court does not find it necessary to determine the other question."

In Peete vs. Morgan, 19 Wallace, 538, it was held in a case involving the two clauses of the constitution of the United States:

1. "No State shall, without the consent of Congress, levy any duty on tonnage."

2. "Congress shall have the power to regulate commerce between the States."

The Legislature of Texas, August 13, 1870, enacted that every vessel arriving at any quarantine station of any town on the coast of Texas, should pay $5.00 for the first 100 tons, and one and one-half cents for each additional ton. The court say on page 583:

"It is evident that the power to establish quarantine regulations cannot be executed without the State possesses the means to raise a revenue for their enforcement; but it is equally evident that the means used for this purpose must be of such a character as the restrictions imposed by the Federal Constitution upon the taxing power of the State authorize. * * The tax in question is manifestly outside the jurisdiction of the State to impose, as it is a 'duty of tonnage' within the meaning of the Constitution. * * This power cannot be exercised without the permission of Congress, and Congress has never consented that the States should levy any duty on tonnage." * *

"It is not necessary to discuss this subject, as it has recently been fully considered by this Court in the State Tonnage cases, 12 Wallace. In these cases the law of Alabama, levying a tax at so much per ton on all steamboats, was involved. * * This Court,

while conceding the full power of a State to tax property of its citizens, held the inhibition in the Federal Constitution prevented the State from taxing in this mode; much more does this inhibition apply when the vessels are owned by citizens of another State, and are engaged in commerce between the States over which Congress has control."

In the case of Cannon vs. New Orleans, 20 Wallace, 577, was a writ of error to the Supreme Court of Louisiana. An ordinance of New Orleans provided that levee and wharfage dues on all steamboats which shall moor or land in any part of the port of New Orleans shall be as follows: Ten cents per ton if in port not exceeding five days; five dollars per day after said five days shall have expired.

The length of both shores of the Mississippi embraced by the port of New Orleans, is twenty-two miles. The portion on which wharves have been built was at most two miles.

The Supreme Court of the State held the levee dues were but charges as compensation for commercial facilities furnished by the city, for which the compensation was paid, while the plaintiff in error claims the ordinance is in conflict with the two clauses of the constitution already cited, one regulating commerce, the other relating to a duty of tonnage. The court only consider the last question, and hold it to be conclusive, that the ordinance is inoperative and void. The court say on page 580:

"The language of the ordinance covers landing anywhere within the city limits. The tax is, therefore, collectable for vessels which land at any point on the banks of the river, without regard to the

existence of the wharves. The tax is also the same for a vessel which is moored in any part of the port of New Orleans, whether she ties up to a wharf or not, or is located at the shore or in the middle of the river. A tax which is, by its terms, due from all vessels arriving and stopping in a port, without regard to the place where she may stop, whether it be in the channel of the stream, or out in a bay, or landed at a natural river bank, cannot be treated as a compensation for the use of a wharf."

"We are of opinion that upon the face of the ordinance itself, as applied to the recognized condition of the river and its banks within the city, the dues here claimed cannot be supported as a compensation for the use of the city's wharves, but that it is a tax upon every vessel which stops, either by landing or mooring, in the waters of the Mississippi river within the city of New Orleans, for the privilege of so landing or mooring."

" In this view of the subject, as the assessment of the tax is measured by the tonnage of the vessel, it falls directly within the prohibition of the Constitution, namely : " That no State shall, without the consent of Congress, lay any duty of tonnage." Whatever more general or more limited view may be entertained of the true meaning of this clause, it is perfectly clear that a duty or tax or burden imposed under the authority of the State, which is, by the law imposing it, to be measured by the capacity of the vessel, and is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, is within the prohibition."

"There have been several cases before this Court involving the construction of this provision. The more recent and well considered of these are, The Steamship Company vs. The Portwardens of Louisiana, 6 Wall., 31; The Tonnage Tax Case, 12 Wall., 212;

and Peete vs. Morgan, decided at the last term and not yet reported."

"In the first of the cases, the late Chief Justice, who delivered the opinion, seemed inclined to guard against too narrow a construction of the clause, lest its spirit and purpose might be evaded. He says: 'That in the most obvious and general sense, it is true, the words describe a duty proportioned to the tonnage of the vessel; a certain rate on each ton. But it seems plain that in this restricted sense the constitutional provision would not fully accomplish its intent. The general prohibition against laying duties on imports or exports would have been ineffectual if it had not been extended to duties on ships which serve as the vehicles of conveyance. This extension was doubtless intended by the prohibition of any duty on tonnage. It was not only a pro rata tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty."

" The other two cases fully sustain the proposition as we have stated it." * *

"We are better satisfied with this construction of the Constitution, from the fact that this is one of the few limitations of that instrument on the power of the States which is not absolute, but which may be removed wholly or modified by the consent of Congress.

"The cases which have recently come before this Court, in which the State by itself, or by one of its municipalities has attempted to levy taxes of this character, clearly within the letter and spirit of the constitutional prohibition, show the necessity of a rigid adherence to the demands of that instrument. If hardships arise in the enforcement of this principle, and the just necessities of a

local commerce require a tax which is otherwise forbidden, it is presumed that Congress would not withhold its assent if properly informed and its assent requested.

"This is a much wiser course, and Congress is a much safer depository of the final exercise of this important power than the ill-regulated and over-taxed towns and cities, which are not likely to look much beyond their own needs and their own interests.

" We are of opinion that the ordinance under which the levee dues were assessed upon the plaintiff's vessel is unconstitutional and void.

"The judgment of the Supreme Court of Louisiana is, therefore, reversed, and the case remanded to that Court for further proceedings in conformity to this opinion."

These constitutional questions have frequently been before State Courts, and they have had no hesitancy in declaring statutes in contravention of the United States Constitution void.

The New Jersey statute of 1869, authorizing the appointment of harbor masters, with power to demand and receive a certain fee per ton on all vessels entering the bay of New York within the limits of Jersey City, is a regulation of commerce, authorizes an impost or duty on exports and imports, and lays a duty on tonnage. It is, therefore, in violation of the Constitution of the United States and void. *Hackley vs. Geraghty*, 34 N. J. L., 332.

A law imposing a stamp tax upon foreign and inland bills, passengers, &c., *held*, to be a regulation of commerce, within the meaning of section 8, article 1, of the United States Constitution, and therefore unconstitutional and void. *People vs. Raymond*, 34 Cal., 492.

The act of the Legislature, laying duties on sales by public auction, or by brokers of foreign merchandise, conflicts with the provisions of the United States Constitution, that "no State shall, without the consent of Congress, lay an impost or duties on imports or exports."—*People vs. Moring*, 47 Barb. (N. Y.) 642.

An ordinance of Charleston, South Carolina, by which the harbor masters at the port of Charleston might exact one cent per ton once in every three months, of every steamboat trading from there to adjoining States, was held to be unconstitutional and void. 3 Strobhart, 598.

The Supreme Court of Alabama, in Sheffield vs. Parsons, 3 Stewart and Porter, say: No tax, custom or toll can be levied on the tonnage of any vessel, without the consent of Congress, for any purpose.

The same rule was applied by the same Court in Lott vs. Morgan, 41 Alabama, 250, to vessels duly enrolled and licensed for the coasting trade, which were engaged in towing and carrying freight and passengers between the vessels at anchor below the bar and the city of Mobile.

In Northwestern Union Packet Company vs. St. Paul, United States Circuit Court, District of Minnesota, 3 Dillon, C. C. Rep., 454, the same question involved in this case was before the court. The opinion of the court is as follows:

"The plaintiff is a corporation duly organized under the laws of the State of Iowa, and was engaged during the years 1870 and 1871 in running its boats and barges on the Mississippi river, for the transportation of freight and passengers. This action is

brought to recover money illegally demanded and paid under protest, for the privilege of stopping in the port of St. Paul. The defendant urges that being a municipal corporation, authorized by its charter to build, control and manage wharves and levees within the city limits, it collected the money claimed by plaintiff, by virtue of the following ordinance passed by the City Council:

The Common Council of the City of St. Paul do ordain as follows:

Section I. That the first section of an ordinance, entitled 'wharfage,' approved October 9th, 1869, be and the same is hereby repealed, and said section one shall be and is hereby re-ordained, as follows:

'That every steamboat or other vessel which may land or anchor at, *or in front* of any landing, wharf or pier, within the limits of the City of St. Paul, shall for each and every trip be charged and shall pay to the city of St. Paul the sum of four and one-half cents per ton for each and every ton such steamboat or other vessel may register or measure. Provided, that no boat shall pay more than twenty dollars for each trip, and all boats may remain at the wharf landing or pier for three days from the date of her arrival without extra charge. Provided, said boat or other vessel does not interfere with the landing or departure of any other vessel.'

"And it alleges that the amount collected was a compensation for the use of the levee or wharf built by the city, and was paid voluntarily by the plaintiff."

"Nelson J.—The question involved here, aside from that of voluntary payment, is: Does this ordinance of the city of St. Paul conflict with that clause of the Constitution of the United States

which forbids a State to levy any duty of tonnage without the consent of Congress?

"In the case of Cannon vs. the City of New Orleans, (20th Wallace Rep., 577,) the United States Supreme Court laid down a rule of decision which covers this case."

" The New Orleans ordinance charged a rate per ton 'on all steamboats which shall *moor* or land in any part of the port.'

The ordinance of the defendant fixes the rates per ton on all vessels which may land or anchor at or in front of any landing within the city limits. Provided, no boat shall pay more than twenty dollars for each trip.

The latter ordinance fixes the tax upon a vessel, whether at a landing or anchored in the middle of the stream in front of a landing, and imposes the tax for the trip. It is, therefore, not a charge for the use of the wharf, but for the privilege of arriving at and departing from the port.

The Court further said, that ' whatever more general or more limited view may be entertained of the true meaning of this clause of the Constitution, it is perfectly clear that a duty, or tax, or burden, imposed under the authority of the State, which is, by the law imposing it, to be measured by the capacity of the vessel, and is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, is within the prohibition.'

This ordinance, by its terms, imposes the tax upon every vessel that stops in the port in front of any landing.

The testimony is conclusive that the payment was not made voluntarily.

The Supreme Court of the United States on the Tonnage Tax

Case (12 Wallace, p. 209,) said: * * 'If the tax is illegal * * and paid * * under protest, or with notice that the party intends to bring a suit to test the validity of the tax, he may recover it back in such an action"

The plaintiff occupies the position defined by the court, and is entitled to recover.

Judgment will be entered in its favor and against the defendant for the sum of five thousand nine hundred and seventy-eight dollars and ninety-seven cents, with costs.

The claim of the city, we believe, is that the wharfage is a tax for the use of the street(*a public highway*)for the purposes of landing for steamboats, and is not within the constitutional provisions; that it is within the exception noticed in the opinion of the Supreme Court of the United State, in the case of Cannon vs. New Orleans, 20 Wallace, 582, where the Supreme Court says:

"We do not understand that this principle interposes any hindrance to the recovery from any vessel landing at a wharf or pier owned by an individual, or by a municipal or other corporation, of a just compensation, for the use of such property. It is a doctrine too well settled, and a practice too common and too essential to the interests of commerce and navigation to admit of a doubt, that for the use of such structures, erected by *individual* enterprise, and recognized everywhere as private property, a reasonable compensation can be exacted. And it may be safely admitted also that it is within the power of the State to regulate this compensation, so as to prevent extortion, a power which is often very properly delegated to the local municipal authority.

Nor do we see any reason why, when a city or other municipality is the owner of structures, built by its own money, to assist

vessels landing within its limits in the pursuit of their business, the city should not be allowed to exact and receive this reasonable compensation as well as individuals. But in the exercise of this right care must be had that it is not made to cover a violation of the Federal Constitution in the point under consideration."

Webster defines a wharf to be a perpendicular bank or mound of timber, or stone and earth, raised on the shore of a harbor, river, canal, or the like, or extending some distance into the water, for the convenience of lading or unlading ships or other vessels. A pier he defines to be a projecting wharf or landing place.

There is nothing appearing in the pleadings demurred to that the city has ever built any such wharf or pier, or that they have built anything but a street for the use of the public. The ordinance provides (section 2) nothing contained in the section shall be construed to interfere with the use of Water street as a public street. That it is not exclusively a wharf, landing place or pier, built for the accommodation of vessels, to facilitate their business, for the use of which they might be expected to pay a rent. It is a public street for public use for everything else as well as steamboats, and being a public highway, a toll cannot be exacted from a steamboat using it any more than a tax could be levied against a footman for the privilege of using the same street. The streets are in the general public; the corporation have no ownership over them.

We quote from an argument of Jas. H. Davidson, in this case, in Supreme Court of Iowa:

"If each municipality on the margin of the Mississippi river can impose a duty, however small, then each of the sixty landing places, between St. Louis and St. Paul may, and instead of a steam-

boat engaged in this trade, being subject to one tonnage duty or tax, under federal authority, it may be subjected to sixty such tonnage or tax duties, governed by the caprice or cupidity of those who may have control for the time being.

If the principle contended for on behalf of the city be correct, then the commerce of this great river is, to a certain extent, under the control of every port on the river. New Orleans being the entrepot for freight, trade, and commerce, can lay an embargo whenever she chooses, and may enrich herself by exacting a tribute from her less favored sisters. The grain of Minnesota, Iowa, and Wisconsin. The corn, pork and beef of Illinois and Missouri. The cotton of Tennessee, Louisiana and Mississippi, might all be tolled byNew Orleans, before it reaches the jetties of the Balize, and find a lodgment in the sea-going vessels for Mexico, South America or Europe. St. Louis, lying midway of the great valley, emulating the example of New Orleans, with a desire to enrich herself, might span the river at that point with corporate legislation, as she now does with her iron bridge, and insist that north and south shall not exchange commodities through her portals, without paying tribute to her."

And so each town and city along the river might likewise lay her hand on the commerce of the river to destroy it.

Again we quote from Mr. Davidson :

"It is urged that these exactions are merely for the use of facilities, but when the court remembers that the entire front of the cities is declared in almost every instance to be a wharf or public landing, it will readily be seen that the ordinance amounts practically to a prohibition of commerce, except it be on such terms as each city government chooses to impose. If any of the cities

would see proper to specially improve at its own expense, and to maintain special and costly improvements for use of steamboats, which they might or might not use at their option, upon terms imposed by the cities, and at the same time leave an open space or wharf, or landing, dedicated to the public, (which certainly would include steamboats and their owners, as much as a wagon and its owner,) which may be used free of charge, then steamboat owners could not and would not complain. But when a municipal corporation says the entire front of the city lying upon the bank of the river shall, for the purpose of taxing commerce, be CONSIDERED a wharf, and no vessel shall land at, moor or anchor in front of any portion of the same, or make fast to any boat or thing in front of same, without paying a toll to the city in shape of wharfage, it amounts practically to a prohibition of commerce."

"These streets, wharves or landing places, have been dedicated to the public to the same extent that streets in a town have been dedicated to public use. It would be just as reasonable to erect a toll gate on each street or road into the city, and demand a toll from every farmer who comes to trade, as to levy this tax on steamboats. It would be much more reasonable, the streets are not protected by the constitution, by treaties, and by acts of Congress, such as exist relating to the subject under consideration."

We submit this cause to the court, feeling assured that it will meet the consideration its importance demands, and that if it be as we assume, in conflict with the constitution and acts of Congress, that this court will have no hesitancy in so declaring.

Respectfully,

ROBERT H. GILLMORE,
JAMES H. ANDERSON.

In the Supreme Court

OF THE UNITED STATES.

KEOKUK NORTHERN LINE PACKET COMPANY,
Plaintiff in Error.
vs.
CITY OF KEOKUK,
Defendant in Error.
} At Law.

Reply of GILLMORE & ANDERSON to Argument of Defendant in Error.

It is claimed by defendant in error, that Water street being the strip of land along the river, between the front of the lots and the river, was dedicated to the city, not only for street purposes, but for wharves, landings and levees. This was not denied by us in the opening argument, and is conceded.

The city of Keokuk, on this ground so dedicated along the whole river side of the town, about six miles long, has graded and paved about one thousand feet, so that it may be used as a street. It is not in any sense a wharf—such as a city may charge compensation for the use of.

The ordinance under which the attempt was made to levy the taxes sued for, provides that all the ground now

lying, or which shall be made hereafter, between Water street in said city of Keokuk, and the middle of the main channel of the Mississippi River, throughout the entire length of the city, is hereby declared a "*wharf*," subject to be used for such purposes,(Sec. 1,) but nothing in the law shall be construed to interfere with the use of Water street as a public street. (Sec. 2.)

Now for landing at this "*wharf*" throughout the entire length of the city, Sec. 3 provides that steamboats and other water crafts shall pay wharfage at so much per ton on the carrying capacity of the boat, not only for landing, but any steamboat which shall make fast to any part of said wharf, or to any vessel, or other thing upon said wharf or street, or shall use any of said "*wharf or street*" for the purpose of discharging, receiving or landing *any freight* or passenger, shall pay the wharfage fee provided by said ordinance.

We deny the right of the city of Keokuk to levy such a tax. We deny such ordinance is constitutional, but claim same conflicts with the Constitution of the United States. We deny that the city has any right to exact toll for the use of a street dedicated to the public. We admit that if the city had built a packet depot, or had built a wharf, had provided facilities for the exclusive use of steamboats in their business, for such structure reasonable compensation might be charged, allowing steamboats the option to use them or not, as they chose; but this case is different; they call six miles of river bank "*wharf*," and the ordinance provides a tax, which they call wharfage, shall be paid for the use of this (wharf) river bank; and they provide that this tax shall be levied in an unconstitutional and illegal manner, on the carrying

capacity of the vessel, even for landing a passenger. A vessel of fifty tons, landing twenty passengers, pays one dollar; a vessel of defendant, of four hundred tons, if she land one passenger from Warsaw, five miles away, whose passage would be twenty-five cents, must pay five dollars. If the city have power to thus tax the carrying capacity of the boats it may make it what it pleases. It is said we do not question the reasonableness of the charge; we do, and have said all we care to in our former argument on this head.

Let it be noted that the wharf, for the use of which the ordinance imposes a tax, *is not an actual wharf, but that it is a constructive wharf, a wharf by ordinance or statute; that it is only a wharf because the ordinance declares it to be such.*

A boat fastened to a buoy, or anchored in the stream, at any point between the middle of the channel and the line of Water street, is liable to this duty per ton! It is liable, also, not according to the length of time, or the extent of the use, but is liable in proportion to the number of tons.

We have had ill success in stating the positions we assume, if the court shall understand them, as counsel for the city state them.

In their argument, near foot of page thirty-six, counsel say:

"But the defense is placed on the distinct, sole ground that *all compensation is actually forbidden* by the Constitution and laws of the United States."

Nothing could be further from the truth.

Our objections to the ordinance are two fold:

1. The tax is levied on boats which are moored to any part of the port, whether they are tied to the paved landing or not.

2. "*The assessments of the tax is measured by the tonnage of the vessel.*"

The second proposition is in quotations. The language used is that of the Supreme Court in the case of Cannon vs. New Orleans, 20 Wallace.

Let us again cite the paragraph in which it is used:

"In this view of the subject, *as the assessment of the tax is measured by the tonnage of the vessel, it falls directly within the prohibition of the Constitution, namely: 'That no State, without the consent of Congress, lay any duty on tonnage.*" Whatever more general or more limited view may be entertained of the true meaning of this clause, it is perfectly clear that a duty, or tax, or burden, imposed under the authority of the State, which is by the law imposing it, to be measured by the capacity of the vessel and is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, is within the prohibition."

In their discussion of the principles decided in this case, counsel for the city ignore the point of the above paragraph.

They claim (and properly,) that the decision authorizes the collection of a reasonable compensation for the use of its wharves; but they forget the caution of the Supreme Court, that "in the exercise of this right care must be

had that it is not made to cover a violation of the Federal Constitution in the point under consideration."

We have already adverted to the fact that the ordinance does not measure its tax on the boat, by the extent of the use, or the time during which the landing is used. The boat of four hundred tons may merely touch at the landing and discharge a single passenger. The ordinance fixes the tariff to be paid by it at five dollars, *because* it has a tonnage of four hundred tons.

The boat of one hundred and fifty tons may occupy the landing for twenty-four hours, and discharge a full cargo, by paying its tariff of one dollar and fifty cents, *because* the ordinance fixes that tariff for its tonnage.

Upon its very face, therefore, the ordinance has no regard to the matter of "*reasonable* compensation."

Its only guide is the tonnage of the vessel. The tax is proportioned to that, and to nothing else.

In the passage of the ordinance the city did not "exer-se care in not making it cover a violation of the Federal nstitution."

On page thirty-four of the argument for defendant in r, counsel cite the decision in the case of The North stern Union Packet Co., vs. the City of St. Paul, 3 on, p. 454, as follows:

"The decision is placed expressly on the ground that the rdinance of the city of St. Paul fixes the tax upon the vesel, whether at a landing or anchored in the middle of the stream, in front of a landing. *It is therefore not a charge for the privilege of arriving and departing from the port.*"

The conclusion here stated by counsel is precisely the opposite of what was decided.

The court itself says, on page 455, near the bottom :

"*It is therefore not a charge for the use of a wharf, but for the privilege of arriving and departing from the port.*"

We have also before us a syllabus of the decision of this court, in the case of the Inman Steamship Co. vs Tinker, decided at the October term, 1876, found in the August number of the Am. Law Register, p. 499, &c., which is much in point, viz :

"In 1862 the Legislature of New York passed an act defining and regulating the powers, duties, and compensation of the captain and harbor master of the port of New York ; amended April 17, 1865. The sixth section declares: "The following fees shall be collected under this act, and no others. All ships or vessels of the United States of one hundred tons burthen or more, except lighters, tugs, barges, and canal boats, sound and river steamboats, employed on regular lines, and all ships or vessels that are permitted by the laws of the United States to enter on the same terms as vessels of the United States, which shall enter the port of New York, or load or unload, or make fast to any wharf therein, shall pay one and one half of one per cent. per ton, to be computed from the tonnage expressed in the registers of enrollments of such ships or vessels, respectively ; and all other foreign ships which shall arrive at and enter the same port, and load or unload, or make fast to any wharf therein, shall pay three cents per ton, to be computed on the tonnage expressed in the register or documents on

board." *Held*, that the State in passing this law, imposing a tonnage duty, exercised a power expressly prohibited to it by the Constitution of the United States, and that in that particular the law was therefore void."

In the light of these decisions, we submit that there is nothing more to be said. They are conclusive of the questions now before the court. Counsel for the city have failed to cite a single case in conflict with them.

The causes cited by them, may, many of them, be very good law in a suitable case, but not one of them justifies a tax levied upon the tonnage of a vessel.

There are other suggestions in our first argument, which we deem worthy of consideration, but to which counsel for the city make no reply. We need not recapitulate them here. We therefore respectfully submit the case.

ROBERT H. GILLMORE,
JAMES H. ANDERSON,
Att'ys for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE UNITED STATES.

KEOKUK NORTHERN LINE PACKET COMPANY,
Plaintiff in Error,
vs.
CITY OF KEOKUK, Defendant in Error.
} At Law.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

GILLMORE & ANDERSON, ATTORNEYS FOR PLAINTIFF IN ERROR.

CRAIG & COLLIER, ATTORNEYS FOR DEFENDANT IN ERROR.

BRIEF OF CRAIG & COLLIER.

Keokuk Constitution Print.

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STATEMENT.

The defendant in error, the City of Keokuk, brought suit against the plaintiff in error, the Keokuk Northern Line Packet Company, in the District Court of Lee County, Iowa, at Keokuk, for $286, wharfage on the

steamboats of the said Packet Company. The Plaintiff in said suit, made the following allegations in its petition:

"Plaintiff shows that it is a municipal corporation, duly existing by virtue of a special charter from the legislature of the State of Iowa. That as such municipal corporation, by virtue of its charter, it is empowered to establish and regulate wharves, and to fix rates of landing and wharfage of all boats, rafts, water crafts, &c., moored at, or landing at said wharves. That the said plaintiff built wharves at the levee within the bounds of said city, and expended large amounts of money for building the same and in making additions to the wharf, and in keeping the same in repair * * amounting in all to $17,752.06; and in addition thereto, on November 1st, 1868, the city issued its 8 per cent bonds, to the amount of $29,000, for the sole purpose of wharf improvement. That said bonds have been negotiated by the city, and the proceeds expended on the wharf; and to meet the interest and principal of said bonds, and the keeping in repair of said wharf, it then and there became and was necessary for the city to fix a certain wharfage fee to be paid by boats, vessels and water crafts; and on the 26th of February, 1872, the city council of the city of Keokuk passed Ordinance 59; a copy of Section 3 of said ordinance is hereto attached and marked Exhibit B, and made a part hereof. That the semi-annual interest on said bonds amounts to $1,160.00, being $2,320.00 per annum. That the actual income for the wharfage each year does not amount to more than sufficient to pay the interest on said bonds. That the defendant's boats

landed at the specially improved wharf, and occupied the same for discharging and receiving freight and passengers during the months of July and August, to-wit: from July 6th to August 11th, and that the wharfmaster of the city of Keokuk made a demand each time for payment of wharfage, which was refused, and that there is now due to plaintiff from defendant the sum of two hundred and eighty-six dollars."

Said petition also set forth, that said claim was for wharfage on the following boats of said Packet Company, landing as aforesaid in July and August, 1875, at the following rates: On the Damsel, a boat of over 200 tons, at $2.00 a landing; Andy Johnson, a boat of over 400 tons, at $5.00 a landing; Minneapolis, a boat of over 400 tons, at $5.00 a landing; J. H. Johnson, a boat of over 400 tons, at $5.00 a landing; Lake Superior. a boat of over 400 tons, at $5.00 a landing; Rob Roy, a boat of over 400 tons, at $5.00 a landing; Northwestern, a boat of over 400 tons, at $5.00 a landing; Belle of La Crosse, a boat of over 400 tons, at $5.00 a landing; Clinton, a boat of over 400 tons, at $5.00 a landing; Alex. Mitchell, a boat of over 400 tons, at $5.00 a landing; Red Wing, a boat of over 400 tons, at $5.00 a landing; Minnesota, a boat of over 400 tons, at $5.00 a landing; Muscatine, a boat of over 300 tons, at $4.00 a landing; Savanna, a boat of over 300 tons, at $4.00 a landing; amounting in the aggregate to $286.

Said "Exhibit B," being Section 3 of said ordinance, is as follows:

"That any steamboat which shall make fast to any part

of said wharf or Water street, or shall receive or discharge any passengers or freight thereon, or shall use any of said wharf for the purpose of discharging, receiving or landing any freight or passengers, shall, if the tonnage of said boat be less than than fifty tons, be liable to a wharfage fee of one dollar; if the tonnage of said boat be less than one hundred tons, and more than fifty tons, the same shall be liable to a wharfage fee of one dollar and fifty cents; all boats of one hundred tons, and less than two hundred tons, shall be liable to a wharfage fee of two dollars; all boats of two hundred tons, and less than three hundred tons, shall pay a wharfage fee of three dollars; all boats of three hundred tons, and less than four hundred tons, shall pay a wharfage fee of four dollars; and all boats of from four hundred tons and upwards, the sum of five dollars; and all boats that shall remain at said wharf or street over two and less than five days, shall pay a wharfage fee of one dollar and fifty cents for each day after the first two days; and should said boat remain at said wharf or street over five days, said boat shall be liable to a wharfage fee of one dollar per day for every day it may remain at said wharf or street over five days; provided that the city council may fix by resolution, the sum to be paid as wharfage, by boats plying regularly between the city and Warsaw, Alexandria, or Nauvoo; said wharfage fees to be paid by the owner, captain, clerk, mate, or agent of said boat, to the wharfmaster or his deputy: Provided, further, that boats engaged only in towing rafts, and only landing at the wharf for the purpose of fuel or stores for its own use, shall be exempt from wharfage."

Said petition prays judgment for said sum of $286, with interest and cost of suit.

The Packet Company, defendant in said suit, in its answer admits that the city of Keokuk is a municipal corporation, under a special charter; and that the said Packet Company landed its boats at Keokuk; that the wharfage was charged under the city ordinances of the city of Keokuk; and that it refused to pay said wharfage. The answer also alleges that said Packet Company is a corporation organized under the laws of the State of Missouri, and is engaged in navigating the Mississippi River with steamboats.

The answer also sets out Sections 1, 2, 3 and 4 of said ordinance of the city in relation to the collection of wharfage; and alleges that the steamboats named in the petition are each over twenty tons burden; and at the time named were engaged in navigating the Mississippi River from St. Louis, Missouri, to St. Paul, Minnesota, engaged in commerce between the states of Minnesota, Iowa, Wisconsin, Illinois and Missouri; and landed at Keokuk, one of the regular ports; and while so employed, and during the time set out in the petition, were duly licensed and enrolled for the coasting trade under the acts of Congress for the regulation of commerce; and said answer claims that the ordinance under which plaintiff, the city of Keokuk, claims said wharfage was and is illegal and void and in violation of the Constitution and Laws of the United States, and that said wharfage tax is illegal, and plaintiff has no right to recover the same from defendant.

To this answer the city of Keokuk demurred, because

Section 3 of said Ordinance 59, under which the said city claims said wharfage, is not illegal, and does not conflict with the provisions of the Constitution of the United States or the laws of Congress.

This demurrer was sustained by said District Court; and the defendant, said Packet Company, excepted to said ruling, and stood on its answer, and refused to answer over, and thereupon judgment was rendered against defendant, the said Packet Company, in said District Court for $286 and costs.

The plaintiff in error appealed said cause to the Supreme Court of the State of Iowa, and upon hearing therein, the judgment of said District Court was affirmed with costs of appeal.

And thereupon, a writ of error was duly allowed, taking said cause to the Supreme Court of the United States, because the decision thereon was against a right which plaintiff in error claims under the Constitution of the United States and the laws of Congress; the plaintiff in error claiming that the State Court erred in sustaining said demurrer.

The counsel for the plaintiff in error, in the opening of the contest, bring into the field some heavy guns; but they take a tremendous range for their artillery, and shoot wide of the mark. If we cannot reach and maintain our position by flanking their batteries, instead of capturing them, we will surrender at discretion.

We admit, without argument, that to attempt to assail the Constitution and treaties of the United States and

the laws of Congress, and the interpretation given to them by the Supreme Court, would be as foolhardy an undertaking as to assault the Declaration of Independence or the Decalogue. Happily we are under no such necessity. It was not necessary to quote treaties, ordinances, and laws of Congress to prove that the Mississippi River is made a common highway to be forever free; for the laws of God, as well of those of man, have made it so. If any one has ever denied this, we have never heard of him. We admit, too, that Congress has the power to regulate the commerce and navigation of the Mississippi River; and that no state without the consent of Congress, can lay any duty of tonnage, or any tax or duty on imports or exports, whether as between the states or any state and a foreign country; nor can any state do any of these things indirectly. These concessions cover everything which is established by the citations made by the counsel from the Constitution of the United States, treaties, ordinances, and laws of Congress, and by the decisions to which they have referred. But all these concessions leave untouched the proposition contained in the demurrer sustained by the State Court, to-wit: That the city of Keokuk, thereunto having been specially authorized by the State of Iowa, by virtue of its charter, may construct wharves on the bank of the Mississippi River, within its corporate limits; and having done so at great expense to itself, the city is entitled to recover a reasonable compensation for the use of the same from vessels enjoying the facilities which such warves afford for discharging and receiving freight and passengers.

That this claim is not a tonnage tax, nor an impost or duty on imports or exports or inter-state commerce, nor a regulation of commerce or navigation, attempted under state authority, but a case of wharfage in the proper sense of that term, is apparent from the nature of the claim itself, and the facts connected with it as disclosed by the record.

The defendant in error is a municipal corporation. By its charter, passed December 13th, 1848, it is provided:

"SEC. 14. That the city council shall have power * * * to establish and constitute landing places, wharfs, docks, and basins in said city, at or on any of the city property, and to fix the rates of landing, wharfage and dockage of all steamboats, boats, rafts, and other water crafts, and of all goods, wares, merchandise, produce and other articles that may be moored at, landed on, or taken from any landing, wharf, or basin, belonging to said city.

"SEC. 22. The city council shall have the exclusive power to establish and regulate the grade of wharves, streets, and banks along the Mississippi River, within the corporate limits of said city. See Laws of Iowa of 1848."

By the amended charter of said city, passed January 22d, 1853, it is provided: (See Laws of 1853.)

"SEC. 7. The city council of Keokuk, shall have the power to establish and regulate wharf or wharves in said city, and more particularly to use the whole of Water street for said purpose, and to fix the rates of landing and wharfage of all boats, rafts, water crafts, goods, wares, merchandise, produce, and other articles that may be

moored at, landed, or taken from any landing, wharf or wharves, that have been or may hereafter be established by said city; and in case private property is taken for public uses, under the power herein conferred, then the damages and benefits shall be assessed, collected and paid over in the manner provided in the section in reference to streets, alleys, &c."

The courts of the State of Iowa are bound to take judicial knowledge of these provisions of the city charter.

In the case of *Barney v. The City of Keokuk et al*, decided at the last term of this court, and not yet reported, it was decided in reference to this strip of land called Water street, named in the section of the amended charter above quoted, that said Water street was dedicated to the city not only for street purposes, but for the purposes of wharves, landings and levees. The language of the court is as follows:

"Although it should be conceded that the title of plaintiff attached to the ground reclaimed and filled in by the city outside of the original high water, it was a bare legal title subject to the public easement and use, not only for street purposes, but for the purpose of wharves, landings and levees. A street bordering on the river, as this did, according to the plan of the town adopted by the decree of partition, must be regarded as intended to be used for the purpose of access to the river, and the usual accomodations of navigation in such connection."

In the same case this court approves the doctrine of *McMannis v. Carmichael*, 3 Iowa, 1: that the title of the

riparian owner on the Mississippi River extends only to high water mark. They say that the confusion of navigable with tide water, which prevailed in this country till the decision in the case of the Genesee Chief, 12 How. 443, laid the foundation, in many states, of doctrines in regard to ownership of the soil in navigable waters above tide water, at variance with sound principles of public policy; that these doctrines, being settled rules of property in those states, it might not be safe to change them; but that is for the states to determine if they choose to resign to the riparian proprietor, rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. But in Iowa the more correct rule has been adopted after the most elaborate investigation of the subject; that the cases of *Martin v. Waddell*, 16 Peters, 367, *Pollard, lessee v. Hogan*, 3 How., 212, and *Goodtitte v. Kibbe*, 9 Howard, 471, enunciate principles equally applicable to all navigable rivers.

It is, therefore, the settled doctrine of this court and the Supreme court of Iowa, that in Iowa, the title to the shore and bed of the Mississippi below high water mark, is in the State of Iowa. The court then say, quoting the provisions of the charter of the city, quoted above: "We have no doubt that the authorities of Keokuk, representing the public, had the right to widen and improve Water street to any extent on the river side; filling in below high water and building wharves and levees for the public accommodation."

By virtue of its charter from the state, and the dedica-

tion of Water street, for not only street purposes, but for wharf and levee purposes, the city of Keokuk has all the rights of a riparian proprietor, subject only to the qualification that the uses to which it is subjected shall be public. In the case of *New Orleans v. United States*, 10 Peters, 662, the court say: "If the city can claim the original dedication to the river, it has all the rights and privileges of a riparian owner."

One of these riparian rights is the right to construct wharves, and to charge and receive a reasonable compensation for their use. The exercise of this right by private individuals and municipal corporations, is not an obstruction to navigation or a tax on commerce, but it is in aid of both. It is a necessity of navigation. The natural shores of navigable waters do not afford the facilities for landing, and the receiving and discharging of freight and passengers, which navigation and commerce absolutely require. Navigable waters would be of but little use without safe and convenient landing places. A railroad company can build its own depots, stations and platforms for discharging and receiving its freight and passengers. But in the case of commerce by water, this cannot be done except to a very limited extent. It would be utterly impracticable for every navigator to furnish safe and convenient landing places for himself. There is only one practicable mode in which this necessity of navigation can be provided for. That mode is to allow the riparian owner, including cities entitled to riparian rights, to construct and maintain wharves, &c., which shall be open to the use of all upon the payment of a resonable compen-

sation, holding them responsible for their safe condition, and liable in damages for failing to keep them in safe condition. This is exactly the provision of the common law, and is an illustration of its wisdom, suggested, in this instance, by the necessities of navigation, and by experience in providing for them.

In the case of *Dutton v. Strong*, 1 Black, 1, the right of the riparian proprietor on navigable water is fully recognized and positively asserted. The court say:

"Wharves, quays, piers and landing places, for the loading and unloading of vessels were constructed in the navigable waters of the Atlantic states by riparian proprietors, at a very early period in colonial times; and, in point of fact, the right to build such erections, subject to the limitations before mentioned, has been claimed and exercised by the owner of adjacent land, from the first settlement of the country till the present time. * * * Whenever the water of the shore, so to speak, is too shoal to be navigable, there is the same necessity for such erections, as in bays and arms of the sea, and when that necessity exists, it is difficult to see any reason for denying to the adjacent owner the right to supply it. The right must be understood as terminating at the point of navigability; where the necessity for such erections ordinarily ceases. * * Piers or landing places, and even wharves, may be private, or they may be in their nature public, although the property may be in an individual owner; or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to

exclude all other persons from its use, or he may be under obligations to concede to others the privilege of landing their goods, or of mooring their vessels there *upon the payment of a reasonable compensation.*"

The same right is recognized in *The Railroad Co. v. Schurmier*, 7 Wal, 289. After deciding that the title of riparian owners on the Mississippi River stops at the stream, the court say: "Although such riparian proprietors are limited to the stream, still they also have the same right to construct suitable landings and wharves for the convenience of commerce and navigation, as is accorded to riparian proprietors bordering on navigable waters affected by the ebb and flow of tide."

In the case of *Yates v. Milwaukee*, 10 Wal., 497, the lot owner had constructed a wharf in the city of Milwaukee on the margin of the navigable part of the Milwaukee river. The court protected this right of a private proprietor, saying that the riparian owner had "the right to make a wharf, landing or pier for his own use, or for the use of the public, subject to such general rules and regulations as the legislature may impose for the protection of the rights of the public, whatever these may be."

The uniform doctrine of the State Courts is the same.

In the *Baltimore Wharf* case, 3 Bland, Ch. R., 383, the chancellor considers the right to build private wharves, and discusses the subject of wharfage for the use of public and private wharves. Speaking of public wharves—that is those which are open to all—he says: "As to all such as belong to individuals or a body politic, which are

effected with a public interest, the wharfage must be reasonable." He held the wharfage claimed in that case illegal, on the ground that the wharf was made free by the Commissioners. But the Court of Appeals reversed his decree in this respect. See *Dugan et al v. City of Baltimore*, 6 Gill and Johnson's Reports, 357.

Dorsey, J., speaking for the court on page 375, says: "In declaring the wharves on *market* space, common highways, and free for the public use, the Commissioners never designed to surrender their proprietory right, farther than that the wharves should not be held as private wharves, under the absolute dominion of their owners; to which no vessel can approach, or make fast, without the consent of the proprietors; but that they should be "free," that is, (according to its obvious, as well as literal sense,) *open* for the public use. They meant nothing more, than that the use of those wharves should be the common privilege of all; *but never intended to relinquish the natural inherent right, incident to their title of collecting a reasonable and customary wharfage.* They do not agree that it shall be a highway for the use of the public, free of wharfage or expense, but simply that it should be a common highway, "free," or (to use another word of the same import,) *open* for the public use; leaving to the proprietors of the soil their natural, inherent right to collect a wharfage. All our turpike roads are common highways, and free for the public use, but not free from the collection of tolls. A wharf may be free from wharfage, and yet not a highway, or free for the public use; *or it*

may be a highway, and free for the public use, and yet not free from wharfage."

Again on page 386, the Court continues:

"Can anything be more reasonable and just, than this claim to wharfage? The city of *Baltimore*, as proprietor, is bound to cleanse the canal, and to regulate and repair these wharves and streets. The natural fund to defray the necessary expenses of which, is what? The wharfage: an income derived from those who enjoy the benefit of this expenditure. We cannot then by a technical strained construction of the word "free," which those who used it could not have intended it to bear, invert the natural order and fitness of things, and deprive the city of *Baltimore*, as a freeholder, of its inherent rights of emolument, and at the same time, impose on it all the correlative burdens.

"In doing so, we think the Chancellor erred, and therefore reverse his decree, with costs to the appellants in the Court and in the Court of Chancery."

It is a maxim of the law: That he who receives the benefit, should bear the burden. It is no less a maxim, that he who bears the burden, should receive the benefit. In the case just cited, both in the lower court, and in the court of appeals, one of the grounds upon which the right to wharfage is placed, is that the owner or city is obliged to be at the expense of maintaining the wharf and keeping it in repair. Not only so, but the owner or city is liable to respond in damages, if injury results from the unsafe condition of the wharf.

In the case of *City of Pittsburgh v. Grier*, 22 Penn. State R., 54, the city had allowed a lot of iron to be placed on its wharf. The water rose and overflowed it, and a steamboat ran upon it and sank, and the city was required to pay the damages.

In *Bucker v. Brown*, 21 Wend., 710, it was held that a defendant in action for wharfage, may set up by way of recoupment, that the wharf was out of repair, and that he sustained damage thereby. Here we have the burden and benefit connected together and made dependent on each other, as equity requires.

Chancellor Walworth, in *Wiswall v. Hall*, 3 Paiges Ch. R., 313, expressly decides that "to erect a wharf and to receive tolls for the use of the same is a franchise, and cannot be exercised by an individual, except by grant for that purpose by the sovereign, or by prescription, which is supposed to have been founded on a grant, the evidence of which has been lost by the lapse of time. The right to take wharfage or tolls, being a charge on the public and against common right, could not be granted even by the Crown of England, except upon some consideration of a duty to keep the wharf in good repair. But the city of Keokuk is empowered by the state to establish wharves and fix the rate of wharfage, and the obligation to keep the wharf in repair rests on the city.

In *Schwartz v. Flatboats*, 14 La. An., 243, it was held that wharfage dues charged by a corporation is not a tax like that which is levied for the support of government.

In *Geiger v. Felor*, 8 Florida, 325, it was decided, that

a city may construct wharves itself, or by contract with others, giving to them the revenue for a time to compensate them for the erection.

In *Murphy v. Montgomery*, 11 Ala., 586, it was held: That the city of Montgomery, as incident to its rights of property in a wharf, may collect wharfage of those landing at the wharf; but from the interest which the public have in the matter the toll may be regulated by law.

In the case of *Sacramento v. Confidence*, 4 Cal., 45. it is held that the city may collect wharfage of steamboats landing at its wharves.

In *People v. Broadway Wharf Co.*, 31 Cal., 34, it is held that the state alone has the power to grant the right to build wharves, in their nature public, and authorize the collection of wharfage.

The case of *Haight v. City of Keokuk*, 4 Iowa, 199, was to enjoin the city from collecting wharfage on this identical strip of ground called "Water street;" and the contest was, whether Haight or the city was entitled to the wharfage. The right of the city is clearly affirmed.

In *Grant v. City of Davenport*, 18 Iowa, 181, this right is clearly recognized. The court say: "We entertain no doubt, as to the right of the riparian proprietor (outside of any incorporated town or city) to erect wharves or landing places on the shores of navigable waters, if they conform to state regulations (if any) and do not obstruct the paramount right of navigation. The right is expressly recognized in *Dutton v. Strong*, 1 Black, 1, and we can find no case to the contrary. If the proprietor's land is

within the limits of an incorporated town or city, his right must yield to the paramount right (when this right is given by the law of its creation) of the corporation to build, erect and regulate the wharves and landings."

From these cases, and the rights of the federal government as shown by the cases cited by the opposing counsel, and conceded by us, it is plain; that in a port connected with foreign or inter-state commerce, there are three classes of rights to be considered. 1st. The rights of the Federal government, in the exercise of its power to regulate commerce, and other powers granted by the Constitution. 2d. Private rights, such as the ownership of the soil, or the right to the use of the soil, and franchises granted by the state, may confer. 3d. The rights of the state, involving the powers of the internal government of the country. The mistake which the opposing counsel make, is, that the first of these, like Aaron's rod, swallows up the other two; when in fact they are distinct, and not in conflict with each other. And the city of Keokuk, as to wharves and wharfage, has all the rights of a riparian proprietor, and all the rights which the state can confer, as we have shown. It is not necessary to examine the cases cited by the opposing counsel, farther than as they are presented in their own argument, in order to see that they do not affect at all the rights belonging to the second and third classes above enumerated, but on the contrary, contain a clear recognition of them. In the case of *Cannon v. City of New Orleans*, 20 Wal., 577, upon which the counsel for plaintiff in error chiefly rely, the

court is careful to disclaim the inference which the counsel seek to draw from it, in these words:

"In saying this, we do not understand that this principle interposes any hinderance to the recovery from any vessel landing at a wharf or pier, owned by an individual or by a municipal or other corporation, a just compensation for the use of such property. It is a doctrine too well settled, and a practice too common and too essential to the interests of commerce and navigation to admit of a doubt, that for the use of such structures, erected by individual enterprise, and recognized everywhere as private property, a reasonable compensation can be exacted. And it may safely be admitted also, that it is within the power of the state to regulate this compensation, so as to prevent extortion, a power which is often very properly delegated to the local municipal authority. Nor do we see any reason why, when a city or other municipalty is the owner of such structures, built by its own money, to assist vessels landing within its limits in the pursuit of their business, the city should not be allowed to exact and receive this reasonable compensation as well as individuals. But in the exercise of this right, care must be had that it is not made to cover a violation of the Federal Constitution in the point under consideration."

We admit that the propositions contained in this extract, were not points necessarily involved in the case, but they were proper and legitimate qualifications of the doctrine announced, and necessary to guard it from false inference. They were, evidently, well considered, and are emphatic-

ally expressed. We have shown that they are all abundantly sustained by authority, and no decisions in conflict with them can be cited. They are as follows:

1st. That such structures as wharves, erected by individual enterprise, are recognized *everywhere* as private property.

2d. That it does not admit of a doubt, that for the use of such structures, a reasonable compensation can be exacted; that this doctrine is essential to the interests of commerce and navigation instead of being an obstruction to them.

3d. That the state has power to regulate this compensation, and may delegate the same to the local municipal authorities.

4th. That when a city is the owner of such structures, built by its own money to assist vessels landing within its limits, the city should be allowed to exact and receive this reasonable compensation.

No case cited by the opposing counsel is in conflict with any of these propositions. These propositions applied to the facts contained in the record, fully sustain the claim of the city, and the decision of the courts of Iowa in this case.

The petition in this case alleges: that the city has built *wharves* on the levee, within the bounds of the city, and expended large amounts of money in building same, and in making additions to the wharf, and keeping the same in repair, amounting in all to $46,751 6-100, including

$29,000 in bonds issued by the city, and that a wharfage fee was necessary to pay the interest on said bonds and to keep the wharf in repair; and that the wharfage actually received by the city is not more than sufficient to pay the interest on the bonds; and that the boats of the plaintiff in error landed at the specially improved wharf and occupied the same for the purpose of discharging and receiving freight and passengers, during July and August, 1876; and the suit is for the wharfage due for such landings, charged at the rates prescribed by Section 3 of the ordinance.

These allegations are not denied by the answer, yet the counsel for plaintiff in error claim that the pleadings demurred to do not show that the city ever built a wharf, on the ground that Webster defines a wharf to be: "A perpendicular bank or mound of timber or stone and earth, raised on the shore of a harbor, river, or canal, or the lake, or extending some distance into the water, for the convenience of lading or unlading ships or other vessels." It is told of Lord Brougham, that a friend introduced to him Daniel Webster, on his first visit to England, when Brougham treated him with great coolness. But afterwards, when his friend took him to task for his treatment of the great American statesman, he exclaimed: "Great Heavens! what a mistake! I thought it was that fellow whom I can never forgive for his dictionary!" We do not share this feeling for the great lexicographer. But even Homer sometimes nods. It is not philosophical or safe to define a thing by its shape, as Diogones once demonstrated to a Grecian philosopher.

If the great Plato could so trip in his definitions as to confound a man with a cock, we may admit that the great American philologist is not infallible. On tide waters, where wharves were first constructed, they had to be of necessity perpendicular; but when they came to be used on navigable rivers, above the tide, they necessarily assumed another shape. "A perpendicular bank or mound of timber, or stone and earth raised on the shore" of a river not affected by the tides, would not be a wharf, for it would not be "for the *convenience* of lading and unlading ships and other vessels." Except at one uniform stage of water, it would be an obstruction instead of a convenience; yet Webster makes the purpose and uses of the structure, as well as the shape, a part of his definition. The amount of it is then, that according to this definition, a wharf cannot be constructed on a navigable river above the tide. What then does this court mean, when they declare in *Barney v. City of Keokuk et al., Supra*, that they have no doubt that the authorities of Keokuk have power to construct *wharves* on Water street? Why they use the term as all other courts use it, when speaking of such structures on navigable rivers above tide waters, in the sense in which it is commonly used by those who use our language, and in which Worcester defines it, to-wit: "A mole or firm landing place built by the side of the water or extending into it, for the convenience of loading and unloading vessels; a sort of quay." A quay he defines to be, "An artificial bank or wharf by the side of a navigable water for loading and unloading vessels."

In the case of *Pittsburgh v. Grier*, 22 Penn. State R.,

54, cited above to show that a city is bound to respond in damages for not keeping its wharf in safe condition, the term *wharf* is used to designate the public landing at Pittsburgh, which is described as an inclined plane extending into the Monongahela River and paved. Many other cases might be given showing that the courts use the term "wharf," in the sense given to it by Worcester, and apply it to structures similar to the wharf of Keokuk. It is a matter of general notoriety that all wharves on the Mississippi River and its tributaries are constructed in this manner. If the city would have the right to exact and receive a reasonable compensation for the use of a perpendicular structure of stone, earth, or timber, used by vessels for receiving and discharging freight and passengers, it would be absurd to say that the city would not be entitled to the compensation where the structure is made in a shape more suitable and convenient for effecting the very same purpose. That would be, indeed, "to stick in the bark," and to disregard the substance.

Besides, in this case, the pleadings show that the city of Keokuk has constructed a *wharf* at great expense, and that the boats of the plaintiff in error, have used this *wharf* for their convenience in receiving and discharging freight and passengers; and this is not denied in the record. Therefore, the counsel go outside of the record to contradict it, when they claim that the city of Keokuk has no "wharf."

This alleged definition of a wharf, together with an extract from the argument of Jas. H. Davidson, Esq., in

this case in the Supreme Court of Iowa, is all the opposing counsel have to urge against the proposition; that the principles stated in the extract which we have quoted, and which they also quote, from the opinion in *Cannon v. City of New Orleans*, are decisive of this case.

In reply to the extract from Mr. Davidson, we say: All that the city of Keokuk is claiming in this suit is, that the city having constructed a wharf at great expense, and the Packet Company having used such wharf for its convenience in the prosecution of its business, the city is entitled to a reasonable compensation for such use of its wharf; and the Packet Company has no more ground to complain that this is a tax and burden on its business, than that any other legitimate expense of the prosecution of its business is a tax and a burden. We are simply asking that the Packet Company shall pay the legitimate expenses of prosecuting its own business. This may be a burden, but it rests on those who claim and receive the profits of the business. All other branches of business bear this burden. Navigation is not exempt from this universal law of business. If the Packet Company cannot pay its own expenses, it will have to quit business. Neither the Constitution of the United States, nor the laws of Congress, nor the ordinance of 1787, compel the cities and towns on the Mississippi to subsidize it.

The extract states that there are sixty landing places on the river between New Orleans and St. Paul. It might be a very advantageous thing for the Packet Company, for sixty cities and towns to furnish gratis for its

use sixty safe and convenient wharves, and to hold themselves liable to the Packet Company for all damages resulting from the unsafe condition of such wharves; but the Packet Company has no more right to demand this, than it has to demand that these cities and towns shall furnish to it gratis the vessels which it uses in carrying on its business, or the fuel which they consume. The waters of the Mississippi River are free, and therefore the Packet Company cannot be made to pay for the facilities which these waters afford in floating its boats, nor can it be obstructed in their free navigation. No duty can be laid on the merchandise and products which its boats carry, for the Federal Constitution and laws forbid this. Nor can its vessels be made to pay for the mere privilege of stopping at a port on the river, for this also is forbidden.

But a packet company running boats between New Orleans and St. Paul, needs sixty safe and convenient wharves, or improved landing places, for it cannot safely moor its vessels to the natural banks, nor discharge and receive its freight on them without great inconvenience and risk of great damage. Without these no packet company could safely or advantageously prosecute its business. If a packet company should provide and maintain these sixty wharves for itself, that would be a burden tenfold greater than the payment of reasonable wharfage. But that would not meet the wants of the commerce and navigation of the river. All others engaged in navigating the river need sixty safe and convenient wharves

between New Orleans and St. Paul. Each individual boat owner cannot build these sixty wharves for himself, for he could not bear the expense, nor find places to construct and maintain his wharves. It would be a foolish and needless expenditure; for the extract from Mr. Davidson's argument states that sixty wharves—one at each landing place—are all that are needed. After these sixty wharves have been constructed by one packet company or individual boat owner, to allow all others to use them without compensation, would be unjust and in violation of the rights of property, all the more glaring when we consider that public policy requires that the owner of the wharves should be held responsible for their safe condition. To give to all others the right to use them upon the payment of a reasonable compensation to the company or individual constructing, maintaining and owning them, would be coming back to the principle of the common law for which we contend in this suit; but which the extract condemns as an obstruction to the navigation of the river, and as disastrous to its commerce.

But the imperative wants of the navigation and commerce of the river cannot be met in any one of these modes, for cities and towns situated on the Mississippi, or any other navigable river, always have a strip of ground on the river bank dedicated to them for a public landing. They, alone, are invested with the rights of riparian proprietorship. The right to construct and maintain a public wharf—that is, a wharf open to all—is a franchise, and must be granted by the state. The state owns the bed of the river up to the line of high water. See

cases already cited and *County of St. Clair v. Lovingston*, 23 Wal., 46.

On navigable rivers, wharves must be located below the line of high water, and must be constructed by filling in the natural bank of the river. The state alone has the power to authorize this to be done, for these additions to the natural shore are not alluvion, nor governed by the law of alluvion. *County of St. Clair v. Lovingston, Supra.* They are not made by imperceptible degrees. The title to them is in the state, for the title of the soil on which they are placed is in the state. The filling out into the river cannot be done unless the state authorizes it.

City of St. Louis v. The People, 5 Gilman, 650.

Ingraham, Kennedy & Day v. Chicago, D. & M. R. R. Co., 34 Iowa, 249.

In the case of *Atlee v. The Packet Co.*, 21 Wal., 290, it is said that: "In all incorporated towns and cities on navigable rivers, there is in their charters, or in some general statute of the state, express or employed power to establish and regulate landings." Therefore, the cities and towns alone are authorized to construct and maintain these sixty wharves; and to allow them to do so, and charge a reasonable compensation for their use, is obviously the only rational and practicable mode, and also the cheapest mode of providing for this absolute want of of the navigation and commerce. The principle contended for by the city, therefore, instead of being an obstacle to the navigation of this great river, and a bur-

den on its vast and increasing commerce, as claimed in the extract, is in aid of, and essential to, the interests of both. The abuses apprehended are chimerical, when it is recollected that the compensation claimed must be reasonable. Besides, we suggest, that Congress would have power to reform abuses should they arise.

The fact that this reasonable compensation is made as to its amount proportionate to the tonnage of each vessel, does not make it a tonnage tax and liable to constitutional objection. For if a city is entitled to exact and receive a reasonable compensation from vessels using its wharf, obviously the amount of such compensation may be fixed in any convenient and reasonable mode, and no mode could be more just and reasonable than to make the amount dependent on the size of the vessels; for this mode makes the amount exacted proportionate to the benefit received, and the space occupied by the vessels. It would be unreasonable to make all vessels pay the same wharfage fee, without regard to their size. It ought to be adjusted and graduated to the size of the vessels; and the tonnage of vessels is taken as the just measure of the wharfage fee, because that is the just measure of the size of the vessels. But a wharfage fee, although it may be graduated with reference to the tonnage or size of vessels, is not only not a tonnage tax; but it is not a tax or duty of any kind, in any legal sense of those terms. It is a *quid pro quo*—a compensation charged for a consideration received. It lacks the essential elements of a tax or duty. The counsel would have as good grounds to call the compensation paid for the charter

party, or for the construction of a vessel, a tonnage tax, if it was graduated to the tonnage of the vessel, as they have to call a wharfage fee a tonnage tax, because it is graduated in same way.

In Burrel's Law Dictionary, a tax is defined as follows; "A rate or sum of money assessed on the person or property of a citizen, by the government, for the use of the nation or state."

Webster: "In a general sense, any contribution imposed by the government upon individuals for the use and service of the state; whether under the name of toll, tribute, tollage, gabel, impost, duty, custom, excise, subsidy, aid, supply, or other name."

Storey on Const., Sec. 472: "In a stricter sense, a rate or sum imposed upon individuals, (or polls) lands, houses, horses, cattle, possessions and occupations, as distinguished from customs, duties, imposts and excises. Literally, an imposition laid by government upon individuals according to a certain order and proportion, &c.

Duties, in a large sense, is a word nearly equivalent to taxes, embracing all impositions or charges levied on persons or things. In its more restrained sense, it is often used as equivalent to customs, and in this sense is nearly synonymous with imposts.

Storey on Const., Sec. 474.

Burrell's Law Dictionary.

"Imposts. A custom or tax levied on articles brought into a country. A duty on imported goods or merchandise." *Ibid.*

"Taxes are defined as being the enforced proportional contribution of persons and property, levied by authority of the state, for the support of the government and for all public needs, to enable the government to carry into effect its mandates, and to discharge its manifold functions." Cooley on Taxation, page 1.

The levying of these impositions, whether they are called taxes, duties or imposts, is an exercise of the taxing power, which is an incident of sovereignty. All taxes must originate with the legislative department of the government. It alone can authorize taxation of any kind.

We admit that the right to construct and maintain a public wharf, and to exact a reasonable wharfage fee for its use, is a franchise, and must be granted by the legislature. The right of the state to the shores of navigable waters, renders such a grant necessary. The public have an interest in public wharves, and public policy demands that they should be under the control of the legislature, to prevent extortion, and from many other considerations which might be named. But for a legislature to make such a grant to a municipal or other corporation, or to an individual, is no more an exercise or delegation of the power of taxation, than the grant of authority to construct and maintain a toll bridge and charge toll for its use, or to maintain a ferry and charge ferriage. It is totally distinct from the taxing power. The only equivalent which the citizen receives for the payment of taxes, imposts, or duties, is his share in the common benefits of the govern-

ment—the payment is his enforced contribution of the common burden. But a wharfage is based on a special benefit or consideration, received by him who pays it. The wharfage claimed in this suit, is in no sense a "tax" or "duty," and to claim that it is a duty of tonnage, or a tonnage tax, because it is graduated to the size of the vessel, is to ignore the inherent sense of the word *tax* or *duty*. It is not a tax or duty of any kind.

In the *State Tonnage Tax Cases*, 12 Wal., 205, the matter in controversy was a tax, levied under the general revenue law of Alabama. By this law the rate of taxation for property generally was one-half of one per cent; but on all steamboats, vessels and other water crafts, plying in the navigable waters of the state, the act levied a tax at the rate of one dollar per ton of the regular tonnage thereof. This was a tax levied by the state for general revenue, on vessels, not according to their value, as other property was taxed, but according to their tonnage, without regard to their value. This court therefore held that it was a tax levied on vessels, not as property, but as instruments of commerce, and was therefore a duty of tonnage or tonnage tax. But in these cases, page 219, the court say:

"Taxes in aid of the inspection laws of a state, under special circumstances, have been upheld as necessary to promote the interests of commerce and the security of navigation. Laws of that character are upheld as contemplating benefits and advantages to commerce and navigation, and as *altogether distinct* from imposts and

duties on exports and imports and duties of tonnage. Usage, it is said, has sanctioned such laws where Congress has not legislated, but it is clear that such laws bear no relation to the act in question, as the act under consideration is emphatically an act to raise revenue to replenish the treasury of the state, and for no other purpose, and does not contemplate any *beneficial service* for the steamboats or other vessels subject to taxation. Beyond question, the act is to raise revenue without any corresponding or equivalent benefit or advantage to the vessels taxed or to the ship owners, and consequently it cannot be upheld by virtue of the rules applied in the construction of laws regulating pilot dues and port charges."

The decision in the case of *Steamship Company v. Portwardens*, 6 Wal., 31, is placed directly on the ground that the statute of Louisiana enacted "that the master and wardens of the port of New Orleans should be entitled to demand and receive, in addition to other fees, the sum of five dollars, *whether called on to perform any service or not*, for every vessel arriving in that port." This was clearly a tax imposed by the state as a contribution to the salaries of public officers, without any special service or equivalent received by those who were required to pay it. But the inference is plain, that for special services fees may be charged, and we suppose that the state could authorize and regulate such fees, or delegate that power to the municipal corporation—if for nothing else, to prevent extortion—without imposing or authorizing "a duty of tonnage."

The case of *Peete v. Morgan*, 19 Wal., 581, involved substantially the same principle as the case last referred to. The charge in controversy was an enforced contribution, levied by the State of Texas, on vessels engaged in commerce, for the purpose of paying the cost of part of the state government, without any special service or advantage received by the vessels or their owners. It was, therefore, a duty of tonnage.

In the case of *Marshall v. Vicksburg*, 15 Wal., 146, (a case not cited by the counsel) Marshall conveyed to the city certain real estate, and the city released to him certain other real estate. The premises conveyed to the city, embraced the city landing for steamers and other water crafts on the Mississippi River. It was stipulated that Marshall should receive all the wharfages and rents accruing from the premises conveyed by him for ten years. The right of a city to collect wharfage, and also that it may, by agreement, authorize an individual to receive and appropriate to his own use, all wharfage on steamers and other water crafts touching at the public landing of the city, is clearly recognized. And if the right to wharfage is treated as private property and made the subject of contract, and may be transfered to an individual, it is in no sense a tax or duty. The court nowhere intimate in the opinion that for either Marshall or the city of Vicksburg to exact wharfage, was in violation of Federal rights.

In *Cooley v. The Board of Portwardens*, 12 Howard, 299, the wide difference between charges for wharfage

and imposts, or duties on imports or exports, or tonnage, is strongly stated by this court in these words:

"This provision of the constitution was intended to operate upon subjects actually existing and well understood when the constitution was formed. Imports and duties on imports, exports and tonnage, were then known to the commerce of the civilized world, to be as distinct from fees and charges for pilotage, and from the penalties by which commercial states enforced their pilot laws, as they were from charges for wharfage and towage or any other local port charges for service rendered to vessels or cargoes; and to declare that such pilot fees or penalties, are embraced within the words imposts, or duties on imports, exports or tonnage, would be to confound things essentially different, and which must have been known to be actually different, by those who used this language."

In the case of *Northwestern Union Packet Company v. St. Paul*, in United States Circuit Court of Minnesota, 3 Dillon, 454, the decision is placed expressly on the ground that the ordinance of the city of St. Paul "fixes the tax upon a vessel, whether at a landing or anchored in the middle of the stream in front of a landing, and imposes the tax for the trip. It is, therefore, not a charge for the privilege of arriving and departing from the port."

It is not necessary for us to refer to this case further; for the learned circuit judge of that court, concurs in the decision in three cases in the United States Circuit Court of Missouri, very similar to the present case, which we will refer to below; and the same learned jurist, in his

work on Municipal Corporations, Sections 67 and 77, discusses the subject of wharves and the rights of municipal corporation and individuals in them, and to compensation for their use, showing that these rights are just as sacred as the rights of commerce and navigation, and not at all in conflict with them nor the Federal laws which protect them.

Therefore the claim of the city of Keokuk in this suit is unquestionable, unless it can be shown that it is not a *bona fide* claim of wharfage, but a mere cover, under color of wharfage, for an attempt on the part of the city to regulate commerce or to levy a tax upon it. That the claim is not liable to this objection, is shown by the undenied allegations of the petition that the claim in suit is for wharfage, for the landing of the boats of the K[illegible]k Packet Company at the specially improved wharf of the city. The claim is put distinctly on the ground: "*That the defendants' boats landed at the specially improved wharf, and occupied it for the purpose of discharging freight and passengers.*" This distinguishes this case from the cases of the Northwestern Packet Company and Cannon v City of New Orleans *Supra.*

We have shown that for this use and occupation of the improved wharf of the city of Keokuk, the city is entitled to receive a reasonable compensation; and also that it is competent for the State to fix the rates of this wharfage or to authorize the city to do so; and that the city has received that authority from the State. And this is really all that there is in the case; for the claim sued on is for nothing else than compensation for the actual use and

occupation by the boats of the Packet Company of the improved wharf which the city has made at great expense, at the rates fixed by the ordinance.

The Supreme Court, in Cannon v New Orleans *Supra*, speaking of this reasonable compensation, says; "And it may be safely admitted, also, that it is within the power of the State to regulate the compensation so as to prevent extortion, a power which is often very properly delegated to the local municipal authority." Public wharves, like public ferries and toll bridges, are franchises. They are open to the public. It would be impracticable to fix the rates of compensation by contract. They cannot be left to the caprice of the wharf master, the ferryman or bridge-keeper. These rates of compensation are always regulated by law. The interests of navigation demand that wharf rates should be so regulated. It is not necessary to deny that Congress may legislate on this subject, at least to correct or prevent abuses; it is enough to say that Congress has not legislated on the subject.

It is not claimed, either in the pleadings or in the arguments of counsel, that the rates fixed by ordinance and claimed in the petition are unreasonable. But the defense is placed on the distinct, sole ground that all compensation is actually forbidden by the Constitution and laws of the United States.

Having shown that the city is entitled to receive a reasonable compensation for the use of its improved wharf by the boats of the Keokuk Packet Company, and that the amount of such compensation may be fixed by ordinance,

and that this is exactly what the city is claiming in this suit, we now proceed to show that there is nothing in the principle decided in Cannon v New Orleans *supra*, nor in the views therein stated, in conflict with this claim of the city of Keokuk; but, on the contrary, there is a clear recognition of its validity.

From the report of the case of Cannon v New Orleans we cannot tell certainly whether the money which Cannon sought to recover back had been originally paid by Cannon for landings which his boat had made at the improved wharf of the city. The ordinance in that case applied to all steamboats *"which shall moor or land in any part of the port of New Orleans."* And we are told that under this ordinance "the city has claimed and collected, of one Cannon, for several years, a tax on his steamboat, the R. E. Lee; and, claiming it again, Cannon filed a petition to enjoin such further collection, and also to recover back the money already paid." The primary and principal purpose of that suit was to enjoin the city from collecting a tax or stated sum from steamboats "which shall moor or land in any part of the port of New Orleans." The city, resisting such injunction, asserted its right to exact from every vessel entering the port and landing or mooring in any part of it, a stated sum of money. The State Court refused to enjoin the city from collecting such tax, and dismissed the bill of the plaintiff. The city of New Orleans in that suit, was claiming the right to exact a tax from any vessels entering and stopping at the port, without regard to the place the vessel might stop, whether it be

in the channel of the stream or out in the bay, or at the natural bank of the river. And the Supreme Court of Louisiana sustained this broad claim of the city by dismissing the plaintiff's bill to enjoin. When, by error to the State Court, that suit was brought before this court, it did not present the question whether the city of New Orleans had the right to collect wharfage from boats landing at the improved wharf; but the broad claim was made by the city, and sustained by the State Court, that the city, under cover of wharfage dues, had the right to collect a tax from all vessels stopping in any part of the port, without regard to the place the vessels might moor.

This court could not have approved the decision of the Supreme Court of Louisiana in that case without affirming the right of the city of New Orleans to collect a tax from vessels moored in the stream or bay, or at the natural bank, and which had not landed at or used in any way the improved wharf of the city. If the case had not involved the validity of the whole of the ordinanc of the city of New Orleans, but had been simply to recover back money paid as wharfage fees for boats landing at the improved wharf of the city, and the decision of the Supreme Court of Louisiana had approved the validity of such ordinance only so far as it authorized the collection of wharfage fees for the use of the improved wharf, it is clear, from the language which we have quoted from the decision, that this court would not have reversed the decision of the Supreme Court of Louisiana; but when the latter court affirmed the right of the city of New Orleans, under authority from the State, to

levy an exaction on vessels moored in the stream or bay, or at the natural bank, for the privilege of stopping at the port, this court could do no less than uphold Federal rights against the illegal encroachments of the authorities of the State of Louisiana." This court says: "The dues here claimed cannot be supported as a compensation for the use of the wharves of the city, but it is a tax upon every vessel which stops, either by landing or mooring, in the waters of the Mississippi river within the city of New Orleans, for the privilege of so landing or mooring." They, therefore, reversed the decision of the Supreme Court of Louisiana, dismissing the bill, and remand the case to that court for further proceedings. But they are careful to say in substance, in the extract which we have quoted from the opinion, that the principle thus announced interposes no hinderance to the recovery of compensation from vessels landing at an improved wharf owned by a municipal corporation.

Now, admitting that parts of the ordinance of the city of Keokuk, quoted by Counsel, may be fairly construed as applying to vessels landing at the natural bank of the river, and authorizing an exaction from them, the city is making no such demand in this suit. The city is not urging such a demand. The District Court of Lee County was not asked to enjoin the city from attempting to enforce such a demand—there is no evidence or allegation that the city is attempting or intending to enforce such a demand. Neither the decision of the District Court nor that of the Supreme Court of Iowa, in this case sustains such a demand, but, on the contrary, both repudiate such

a demand as in violation of the Constitution and laws of the United States. But this case is placed distinctly on the ground that the boats of the Packet Company landed at the improved wharf of the city, and used the same in discharging and receiving freight and passengers, and the District and Supreme Court of Iowa sustain said ordinance of the city of Keokuk only so far as it authorizes the collection of wharfage for such landings at, and such use of the improved wharf of the city.

The case is in this court by writ of error to the Supreme Court of Iowa. What error did that court commit? They did not decide, like the Supreme Court of Louisiana, in the case cited, that the city of Keokuk ununder its charter and ordinances could exact wharfage from boats landing at the natural banks of the river or moored in the stream, but just the reverse of this. They simply hold that the city of Keokuk is entitled to the reasonable compensation fixed by the ordinance for landings actually made at the improved wharf of the city, which the city had made and kept in repair at such expense to itself. But we have shown that this is the right of the city, and that it infringes no rights secured by the Constitution and laws of the United States. How can this court reverse the decision of the Supreme Court of Iowa in this case without denying to a city which has been thereunto duly authorized by the State, the right to compensation for the use of its improved wharf as fixed by ordinance? This is all that the Supreme Court of Iowa has claimed for the State or city authorities, and this court, in the case cited, has said that this

is within the authority of the State, and not forbidden by the Federal Constitution.

The appellate jurisdiction of this court over the State courts is given to uphold the supremacy of Federal laws and to protect the rights secured by them. When the Supreme Court of a State, in a case involving a State statute or a local ordinance founded on State authority, decide that those portions of such statute or ordinance which are in truth and fact in conflict with the Federal Constitution and laws, and the rights secured by them, are null and void, and only uphold such portions of such statute or ordinance as are not obnoxions to such objection; there is no reason or room for the intervention of this court to set aside such decision.

Section 3 of the ordinance of the city of Keokuk, which we have quoted above, and which is made a part of the petition, is in contrast to the ordinance of New Orleans as cited in Cannon v New Orleans, and the ordinance of St. Paul in Northwestern Packet Co. v St. Paul *Supra*, both of which latter apply to and include vessels moored out in the stream in front of the city. The "Water street" named in the ordinance, which is the public landing of the city, is co-extensive with the old city limits, which were a mile square before the extension of the city limits by the act of 1856. One evident purpose of the ordinance was to designate the portions of the river bank which were to be devoted to and used for wharf purposes, and upon which wharves were to be constructed as the growth of the city might require. This is not

liable to any constitutional objection. Another purpose of the ordinance is to fix the rates of wharfage. We have shown that in the case of a public wharf the State may do this, or may delegate the power to the city. The petition shows that the city has expended a large sum of money in the construction of a wharf; and as applied to this wharf these rates of wharfage are properly legitimate. But it is contended that there are portions of the ordinance which seek to apply these rates of wharfage to the portions of the river bank designated and set apart to be used for wharf purposes before wharves are in fact constructed on them. It is not often that the banks of the Mississippi river are or can be used for the purpose of a public landing or wharf without improvement. We might claim that the meaning of these portions of the ordinance is, that these rates of wharfage are to apply to the portions of the river bank which are designated and set apart for wharf purposes, as wharves are constructed upon them. But this is not necessary in order to sustain the claim of the city in this suit. If these provisions of the ordinance will bear no other construction than that claimed by the opposing counsel, then they are void as in conflict with the Constitution and laws of the United States. But it does not follow that the other provisions of the ordinance not obnoxious to constitutional objection are to be set aside and its legitimate purposes defeated. A statute or ordinance will be set aside as unconstitutional only so far as it is in conflict with the Constitution. If the prohibitory liquor law of Iowa contained no exception in favor of imported liquors

sold in the original packages, it would not, therefore, be held unconstitutional; but the language of the law, though it included all intoxicating liquors, would be restricted so as to exclude imported liquors sold in the original packages. In this case, there is no difficulty in restricting the rates of wharfage fixed by the ordinance to the use of the improved wharf of the city, and excluding their application to the unimproved river bank. And this is exactly what the Supreme Court of Iowa did in this case. They expressly hold that any provisions of the ordinance exacting wharfage for boats landing at the unimproved river bank are null and void. They say: "Statutes which are partly in conflict with the Constitution will be held void no further than as to those points which are unconstitutional; provisions which are within the limits of legislative authority will be enforced. *Santo v The State, 2 Iowa, 167; Walters v Steamboat Mollie Dozier, 24 Iowa, 192; City of Des Moines v Lyman, 21 Iowa, 163; Child v Showers, 18 Iowa, 261; High School v County of Clayton, 9 Iowa, 175; County of Louisa v Davidson, 8 Iowa, 517; Dist. Tp. of Dubuque v Dubuque, 7 Iowa, 262,* City ordinances, like statutes, will be upheld to the extent of provisions authorizing the exercise of power clearly within the scope of municipal authority, while other provisions in excess of such authority will be held void. *Dillon on Mun. Corporations, p 354, and Notes.* But if the parts of the statute or ordinance be necessarily connected and dependent, the whole must fall with the void part. The rule must be extended to the case of a statute or ordinance authorizing two or more acts, one of which is

within and the other without legislative authority. The first act when done under such statute or ordinance will be valid, the second void.

The case of *Norris v City of Boston, 7 How, 409*, second of the Passenger Cases, referred to by the opposing counsel, is an example where this court held part of an ordinance void because in conflict with the same provisions of the Constitution of the United States, which are relied on in this case, and upheld another portion of the ordinance as not obnoxious to the same objection. We know that when the different parts of a statute or ordinance are so mutually dependent on each other, and so mutually qualify and limit each other, that one part cannot be removed without destroying or materially changing the portions which remain, the whole must fall together. But there is no such difficulty here. There is no difficulty in eliminating any provision of the ordinance which may require wharfage for landings at the natural bank of the river, and restricting the wharfage to landings at the improved wharf which the city has built. If the city in this ordinance has done things which it can legally and of right do, and has attempted to do in addition something in excess of its authority, it is only the excess which is void.

This court will follow the decisions of the highest court of a State in the construction of a State statute or local ordinance resulting from State authority. The Supreme Court of Iowa has held that the language, character and construction of this ordinance is such that a

portion of it may be held null and void and the remaining portions valid; that its parts are not so mutually dependent upon each other as to prevent this from being done: and this construction will be followed unless it can be shown that the portions of the ordinance which the Supreme Court of this State sustains are in conflict with the Constitution and laws of the United States.

In the case of *Northwestern Union Packet Company v City of St, Louis, Central Law Journal, vol 4, page 58,* (January 19th, 1877), both the Circuit and District judges unite in holding that the city of St. Louis is entitled to receive wharfrge rates as fixed by ordinance from boats landing at its improved wharf; and that such wharfage rates may be graduated to the size or tonnage of the vessel. The language of the court on this last point is; "It would be a narrow view of the question to admit that wharfage is collectable and to hold, at the same time, that the amount of dues is not collectable because the amount, though reasonable, is, instead of a sum certain upon every craft, adjusted to the size of the craft, to be ascertained by its tonnage." His Honor, Judge Dillon, in this case describes how the *wharf* of St. Louis and wharves generally on the river are constructed, showing that he uses the term according to the definition of Worcester given above rather than that of Webster, as cited by the opposing counsel.

The case of *Same v City of Hannibal,* decided by the same judges, presents the same points, held in the same way. *Ibid. page 61.* In the cases: *Same v City of Lou-*

isiana, and same v City of Clarksville, Ibid, page 60 and 61, decided by the same judges, the same doctrine is held. In the last two cases the language of the ordinance covered the river bank within the entire corporate limits; but the suits were for wharfage as fixed by the ordinance for the landing of the Packet Company's boats at the improved wharf, and it was held that the city had the right to said wharfage. In the first of said two cases, the court says: "The ordinance of the city of Louisiana covers the entire corporate limits of that city; and if the plaintiff had paid the so-called wharfage for landing when there was no artificial or improved wharf, there might be grounds of complaint. But the fact is, that the plaintiff's boats chose to take the benefit of the improved wharf, built at the expense of the city, when it was well known what compensation was required for such use."

We submit, in conclusion, that the city of Keokuk in this case does not demand, and the Supreme Court of Iowa does not sustain the city in demanding anything which the State laws do not fully authorize, and which the Federal laws, as interpreted by this court; do not allow the city to demand. Respectfully,

JOHN H. CRAIG,
WILLIAM COLLIER,
Atty's for Deft. in Error.